

No. 97-1802

Supreme Court, U.S.

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In The  
**Supreme Court of the United States**  
October Term, 1998

DAVID CONN and CAROL NAJERA,

*Petitioners,*

vs.

PAUL L. GABBERT,

*Respondent.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

JOINT APPENDIX  
VOLUME III, PAGES 483 to 696

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**EXHIBIT 3****UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

PAUL L. GABBERT,	)	
Plaintiff,	)	
vs.	)	
DAVID CONN, CAROL NAJERA,	)	No. CV 94
ELLIOT OPPENHEIM,	)	4227 RSWL(Ex)
LESLIE ZOELLER	)	
AND DOES 1 THROUGH X,	)	
Defendants.	)	

**DEPOSITION OF DAVID P. CONN**

**Los Angeles, California  
August 4, 1995**

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

PAUL L. GABBERT,	)	
Plaintiff,	)	
vs.	)	
DAVID CONN, CAROL NAJERA,	)	No. CV 94
ELLIOT OPPENHEIM,	)	4227 RSWL(Ex)
LESLIE ZOELLER	)	
AND DOES 1 THROUGH X,	)	
Defendants.	)	

**DEPOSITION OF DAVID P. CONN, taken  
on behalf of the Plaintiff, at 655 South Hope**



Street, Los Angeles, California 90017, commencing at 11:20 A.M., Friday, August 4, 1995, pursuant to Notice, before Joanne Hokyo, CSR #9169.

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\* \* \*

[p. 60] Q And did you have a conversation with Mr. Gabbert at that time?

A Yes.

Q And did he express concern, again, to you, on the morning of the 21st, that her producing any documents responding to questions in his view violated her 5th Amendment privilege?

A I don't remember him saying that that morning.

Q You don't remember that?

A No.

Q There was no conversation about that?

A No. There was a conversation about him coming up to my office so we could talk further. And that's what we did. We went up to my office.

Q Before you left to go up to your office, was the discussion about a possible grant of immunity?

A I don't know that that was discussed beforehand. Reference was made to that in my office. I recall that.

Q But you don't have a recollection of whether it was discussed downstairs on 13?

A No.

Q Is it your recollection that there was nothing of substance discussed on the 13th floor?

[p. 61] A Well, what I do recall was when we inquired about the documents and, as was indicated in the search warrant, the conversation took place at that time where he made reference to having the documents.

Q Documents that were the subject of the search warrant?

A Yes.

Q When you first saw him, was he sitting on a bench seat with his client?

A I think that's what he was doing.

Q And did he stand up when you approached to talk to you?

A Right. I think we approached each other.

Q Did he have with him at that time a briefcase?

A Yes.

Q And did he also have an accordion file with him?

A I don't recall an accordion file.

Q You don't.

Do you recall him telling you that he had on that occasion attempted to get Judge Bascue to continue the Grand Jury appearance, that he attempted to do that on Friday?

A I don't know if that's when I heard about [p. 62] it. But I did hear about it at some point. I can't say whether it was that morning.

Q You can't say whether it was that morning or before that morning?

A Correct.

Q Do you recall his showing you the documents that he had attempted to file? And I'm now talking on the morning of the 21st.

A No. No. I don't recall him showing me documents.

Q You don't?

A No.

Q Do you recall him showing you a number of documents inside an accordion file?

Do you have a recollection of that event?

A No. I don't.

Q Did he make a request of you again to continue the Grand Jury appearance?

A I don't recall if he specifically made the request again.

Q He might have. But you don't recall?

A Perhaps, yes.

Q Might he have shown you these documents that he filed on Friday, tried to file on Friday, but you don't have a recollection today?

[p. 63] A I suppose it's possible. But I just have no recollection of that.

Q How long was the conversation with Mr. Gabbert when you first met him on that morning?

A It was just for a couple minutes.

Q Did you then proceed with him to your office?

A Yeah - no. I'm not sure that we walked together, or I said, "I'll meet you up there."



Q And did you eventually meet him up in your office?

A Yes.

Q And was he with Traci Baker when he came to your office?

A Yes.

Q And were you still with Ms. Najera?

A Yes.

Q Had you had contact either on the phone or in person with Detective Zoeller before you met with Mr. Gabbert in your office that morning?

A No. I don't remember when Zoeller arrived.

Q Is it fair to say that you had not asked Zoeller to be there on Monday morning before you got there?

A Whether I requested him to be there before

\* \* \*

[p. 66] the only immunity authorized by statute in California was transactional immunity?

A Yes.

Q Did you discuss, not offer, but just discuss the grant of use immunity with Mr. Gabbert in your office that morning?

A No.

Q Tell us if you remember what the conversation was with respect to immunity?

A I once again proposed to him in front of his client that we might be able to resolve this matter so that she could testify and she would receive immunity from criminal prosecution. And I reiterated our procedure, which is that the person receiving the immunity must first provide a statement.

And it is use immunity in the sense that that statement would not be used against them. But that statement would not be utilized in Court. That would only be for the purpose of determining whether or not we should give them a full grant of immunity.

So Mr. Gabbert appeared to not be very informed in this area. And I was somewhat taken aback because he seemed to not really understand what I was proposing or the need to resolve it expeditiously.

And he said, "Well, I would need more time [p. 67] to think about this." I seem to recall saying - inquiring why he would need more time to think about it. It's pretty straightforward.

"Let's get a statement from her right now. I can get the approval immediately, and she could be testifying under full grant of immunity this morning if that's what it's going to take."

Q Were you talking about a written proffer from him or his client?

A No. It wouldn't have to be written. It could be just verbally. We would could just sit down with her and interview her with the understanding that the statement would not be used against her.

Q So that's what you told Gabbert?



A Right.

Q Was there a discussion about whether or not, even though it wouldn't be used against her, it could be used for leads in your investigation?

Do you recall that having been discussed?

A No. I don't think we got into that aspect of it. I'm sure we didn't get into that aspect of it.

Q Was there any talk about whether it could be used to impeach her if you eventually decided not to give her immunity and prosecuted her and she testified?

A I don't think we got into - again, these [p. 68] are concerns that perhaps a defense attorney or Ms. Abramson might have or one of the other defense attorneys on the case. So they're not really my concerns.

Q Just assume they are concerns a defense attorney might have.

Do you recall Mr. Gabbert mentioning these concerns about the use of the statement that she gave?

A No. I remember him very uninformed and simply saying, "Well, I need time to think about this." And I was surprised how unprepared I think he was to discuss these matters.

And it became very clear to me at that point that with him not having enough knowledge in this area, he was not going to be prepared to do anything today. So we were just spinning our wheels. And she was going to have to take the 5th. He made that very much clear that he was going to need more time.

And he spoke about some sort of a letter outlining what it was that I was proposing. And I said, you know, "If that will help, we could do that. But now is the time. Today's the day. I would just like to do it now."

And he said, "I really can't do anything today. I would like to look at the immunity statute. I would like to research this area." And I was surprised [p. 69] that he didn't research it already or have more knowledge of this coming into the meeting.

But in any event, I knew that given his lack of knowledge and whether he was going to be conferring with other defense lawyers who are involved in my case, I felt that for whatever reason he was not going to be prepared to do anything today.

So I said, "All right. Let's just go downstairs, and we'll ask our questions. And if she's going to take the 5th, then she takes the 5th."

Q During the conversation, did you and he discuss the possibility of your putting in a letter, the procedure that you were suggesting?

A Yeah, yeah. That was one of the things that we discussed. He wanted to see it in writing.

Q Did you tell him that you would do that?

A Yeah. I told him, "If necessary, that's something that we can do." But again I was trying to persuade him that this is something that we can accomplish today.

Q Did he say to you that he would go down to the Grand Jury if you brought the letter down, and it was

satisfactory that he would follow the procedure that you recommended?

A No. No. He never said that.

[p. 70] Q He didn't say that?

A No.

Q How long did he remain in your office on that occasion?

A Just five minutes.

Q And the participants were you, he, his client and Carol Najera?

A I believe Carol was there. Whether she was in or out, I'm not clear about.

Q Zoeller was not there?

A I don't think Zoeller was there.

Q And when he left the office on that occasion, did you understand that he was going back down to 13?

A Yes.

Q And it was your state of mind that you were going to prepare a letter to bring down to him?

A That - no. That was still a possibility. But I also knew by this point that we would be getting a search warrant. And once we had the warrant, there might be a change of strategy on his part.

If we got the warrant and we got the documents that we requested, it might not even be necessary to outline

the immunity and so forth as we previously had contemplated. So writing the letter wasn't [p. 71] a priority at that point.

Q Did you read the Complaint in this case that was filed that started this lawsuit?

A No.

Q You haven't read it?

A No.

Q Mr. Gabbert alleges that when he left your office on that occasion, that you indicated that you were going to have that letter prepared and brought down to the Grand Jury room.

A Uh-huh.

Q Would you disagree with that statement?

MR. BRAZILE: That you just made?

MR. LIGHTFOOT: Yeah.

Q And what I'm doing is I'm characterizing his deposition testimony that he believed when he left your office that you were going to have a letter typed up and brought down for him to review.

Would you disagree with that?

MR. BRAZILE: Well, I'm going to lodge an objection. It calls for speculation and conjecture on the part of this witness.

He's testified as to what his intentions were. As to what Gabbert's interpretation of that was, there's no way



for this witness to know. You're asking [p. 72] for him to speculate about Gabbert's interpretation of the conversation.

MR. LIGHTFOOT: This is a deposition. So that's all I'm asking.

Q I'm not asking for your personal knowledge. But when you left the room, was it your understanding that he believed that you were going to come down with a letter when you went to the Grand Jury?

MR. BRAZILE: I'm not instructing the witness not to answer the question.

But if you know what he was thinking, you can answer. But if you don't know what he was thinking, I don't want you to guess or speculate what's in his mind.

THE WITNESS: All right. I can't speculate as to what was in his mind. But I can tell you that the letter was still something that we were discussing as a possibility that would facilitate discussions in this area.

But it was very clear to me that he was not going to take this letter and then right then and there on the spot tell his client, "Okay. Go ahead and testify." I mean, he made it very clear to me that he was going to need time to process this, to do his research. And I suspect to go to talk to defense attorneys on the case.

So I simply - as I said, the letter was [p. 73] not a priority for me at that point.

Q Did you say anything to your secretary before Mr. Gabbert left your office with respect to her typing up a letter as we've just discussed?

A I don't recall following through with the letter.

Q I'm going to jump forward, and then I'm going to come back.

Eventually, you went down to the Grand Jury area and met with Mr. Gabbert again, did you not?

A Right.

Q And how many minutes was that approximately after he left your office?

A I really couldn't say how much time it was.

Q Do you recall when you saw him again down - I'm not talking about the Grand Jury room but the Grand Jury section - when you met him that time, his asking you if the letter had been typed?

A No. I don't recall him asking me at that moment.

Q You have no memory of that?

A No.

Q He could have, but you don't remember?

A It's possible. I just don't know how we left the conversation in terms of when this letter would [p. 74] be drawn up. Because as I said, it was clear from him that nothing was going to happen today, no agreement was going to be reached today. So it just wasn't a priority for me.

Q When did you decide to apply for a search warrant?

A After he indicated that he had the documents.



Q This was down in the Grand Jury area?

A Correct.

Q Do you recall the words he used that put you in that state of mind?

A I don't recall the exact words. But I do recall, as I indicated in the search warrant, that we had a conversation concerning the specific documents that we requested, and he said - he indicated to me, "Yes. I have it here." He referred to his briefcase.

Q And he did gesture in a direction -

A I believe he lifted up his briefcase kind of and, you know, saying "I have it here," something to that effect.

Q Do you recall that you asked him whether he had the letters himself?

A Yeah. I was the one who spoke.

Q You asked, not using those exact words [p. 75] necessarily, but you asked that question whether he possessed the documents which were the subject of this Subpoena?

A Correct.

Q All right.

And Ms. Najera was there, was she?

A Right.

Q Right.

And did you decide at that moment in time that you were going to get a search warrant?

A Yes.

Q And what's the first thing you did with respect to obtaining a search warrant after that moment in time?

A I know I made contact with both the secretary Patty Fairbanks and Les Zoeller, who had arrived by this point in time, and informed them that they would add to the existing search warrant, which I know now was on the computer in the D.A.'s office.

Q How did you know that?

A I remember that they - on Friday I remember Patty working on it on Friday. I was present when she was working on it.

Q So does that refresh your recollection as to where Zoeller signed the affidavit?

[p. 76] A Right. He must have signed it - yeah. He signed in the Criminal Courts Building.

Q He did?

A Right.

Q And that affidavit that you were looking at before the March 18th affidavit, that was typed up by Patty Fairbanks?

A Right. I don't know if Les Zoeller brought something to her in handwriting or typed up, but the document was eventually done by Patty.

Q Did your office have the capability of - , I don't know what the right terminology is - using information in computers at Beverly Hills Police Department?

A No. Not that way. But Les Zoeller might have brought it on the disk, or he might have brought a handwritten affidavit. But eventually I know Patty put it into our computer.

Q Do you remember now reading the affidavit before it went down to Judge Pounders on the 18th?

A I'm sure I did.

Q And the search warrant itself?

A I'm sure I did.

Q When you left Mr. Gabbert for the first - when you had your first meeting with him that morning - [p. 77] you've indicated in the Grand Jury section -

A Uh-huh.

Q - sometime in the 9:00 o'clock area, would you say?

A Right; in the hallway.

Q In the hallway; right.

Is it fair to say that you then went up to your office not in the company of Gabbert?

A We may have went up on separate elevators. I'm not sure.

Q Did you take steps to have a warrant issued between the time that you left Gabbert on the 13th floor and you're sitting down and beginning your conversation with him in your office that morning?

A Yeah. I think I caused the warrant to be amended to add the new information. But whether I did that before

speaking to Mr. Gabbert or after speaking with Mr. Gabbert in my office, I don't know.

Q Right.

A But it was after I spoke to him in the hallway.

Q Now, when Mr. Gabbert left your office to go back down to 13, had you met with Mr. Zoeller yet?

A I'm sure by that time I had.

Q But he was not in the meeting that you had

\* \* \*

[p. 86] selection of Elliot Oppenheim off the list yourself?

A Right. I'm sure I didn't.

Q You have no recollection who did that?

A No.

Q Was Mr. Zoeller now up in your offices, your office itself, and the secretary's area at this time as you're preparing the search warrant?

A Was he where?

Q Was he in your office or in the general area of your office?

A I don't know where he was. He was working with Patty, I'm sure, in putting together the warrant. So I'm sure he was in the area.

Q Did you draft that portion of the probable cause affidavit which was added to the existing affidavit?

A Could I see that.



Q Sure.

I don't want to interrupt you, but I'm talking about that portion of the affidavit that begins on page 7, line 15 and proceeds to the end of the affidavit.

A Right. Yeah.

I can't recall who actually used this language, whether this was that paragraph which begins on line 15 or - something that Les Zoeller drafted or I drafted, I don't know.

[p. 87] But then I do know that I provided the information, that which appears on line 23. And Mr. Gabbert informed me that he has the document referred to the [sic] in the warrant in his possession and on his person.

Q Is it fair to say, Mr. Conn, that the whole of that paragraph, proceeding down through line 7 on page 8, would have been knowledge in your particular possession and not Mr. Zoeller's?

MR. BRAZILE: Objection. It calls for speculation and conjecture on the part of this witness. Lack of foundation, and it assumes facts not in evidence.

Everything all the way down to line 8 on the following page?

Why don't you read that?

THE WITNESS: Right.

BY MR. LIGHTFOOT:

Q You're not saying "right" to the question? or are you saying "right" to the question?

A No. What I'm saying - I - I can't say how much knowledge of all these facts Les Zoeller had. But I can tell you that, as I said I was aware - let's take that line by line -

Q Just for the reporter's sake, we're starting on page 7, line 23.

A Right.

[p. 88] Q The first sentence was knowledge that you had; is that not correct?

A That's correct. And I provided that to Les Zoeller so that he could complete his warrant.

Q And the second sentence, that's knowledge that you had, personal knowledge that you had that Mr. Zoeller didn't have?

A Correct.

Q And the next one, that's information you came into possession of?

A Correct. And as I said earlier, that's something that I learned at some point. And exactly when I learned that, I'm not sure.

Q And you learned the next sentence that Judge Bascue denied his motion without prejudice?

A Correct.

Q By the time this information was provided to Ms. Fairbanks, had you seen the order of Judge Bascue denying the motion without prejudice?

A As I said, I don't have any recollection of seeing those documents.



Q Have you seen that order?

A I don't - no. I don't have any recollection of seeing it.

Q The next sentence, Mr. Gabbert still

\* \* \*

[p. 110] A Oh, yes.

Q And it was your understanding that he was going to execute the warrant?

A Correct.

Q Now, you made a decision before you sat down with Mr. Gabbert in your office to have the warrant issued, did you?

MR. BRAZILE: Are we talking about the warrant for his person or for his office?

MR. LIGHTFOOT: No. Until I say otherwise, I'm talking about the warrant that was issued at 10:03 for his person.

THE WITNESS: Could you state that again.

BY MR. LIGHTFOOT:

Q You made that decision between the time that you left Mr. Gabbert when you saw him for the first time in the Grand Jury and then sitting down with him in your office on the 18th floor?

A Yeah. I believe it was at that point in time that I determined that we should seek a warrant for his person.

Q And at that time you decided to seek a warrant for the person of Traci Baker?

A If I can refer to the warrant.

Q Sure.

[p. 111] A Right. At that point, we knew that they had the documents in their presence - on their possession - in their possession, that is, that Gabbert had it at the moment that I had spoken to him.

And there was always a possibility that he may have handed the documents back to her. So we determined at that point to seek a search warrant for the persons of both of them.

Q So you did it in that respect because at the time you weren't sure who would be in possession of the documents; is that correct?

A Our information was that Gabbert had it in his briefcase at that point in time. But there was always the possibility that by the time the search warrant was obtained, he might have transferred the documents back to her.

Q Because that was the command of the search warrant that she bring the documents with her; isn't that right?

A Correct. Of the Subpoena Duces Tecum.

Q Right.

The command was that when she went into the Grand Jury room that she have the documents?

A That was the command, yes.

And you caused this warrant to be executed [p. 112] shortly before Traci Baker appeared before the Grand Jury?

A Correct. Well, let me see now.

Right. It was before she appeared before the Grand Jury.

Q That the search warrant was executed on Mr. Gabbert?

A Correct.

Q In fact, the search warrant was not executed on Traci Baker, was it?

A I think - no. I don't think she was searched. I don't think she was searched.

Q In fact, the warrant itself indicates through interlineation that the execution of Mr. Gabbert is to be effected through the special master; isn't that correct?

A Correct.

Q And that interlineation is in the hand of Judge Pounders, is it not? You see it on the front page of the warrant?

A Correct.

Q And there is no such interlineation with respect to paragraph 2, dealing with the search of Ms. Baker; isn't that correct?

A Correct.

Q And, in fact, it was your understanding [p. 113] that a special master was not needed to search the person of Traci Baker that morning; isn't that correct?

A Correct.

Q Did you see the execution of the warrant on Mr. Gabbert?

A Gabbert was taken into a room with Oppenheim. And that's where the search, the initial review of the material, took place.

Q I was talking specifically that he was given a copy of the warrant, was he not - Mr. Gabbert?

A I'm not sure if I - I'm not sure if I was present at that moment or if I recall seeing that specifically.

Q Might you have been in the Grand Jury room itself with the Grand Jury at the time that Mr. Gabbert was given a copy of the warrant?

A No. I think I was present when he was - was present when he was first told that there would be a search.

Q Who told him?

A I'm not sure if it was myself or Zoeller. We might have both spoken to him.

Q Was Mr. Oppenheim there at the time?

A Yes. He was at the time.

Q Do you recall whether Mr. Oppenheim was [p. 114] introduced by you or Mr. Zoeller to Mr. Gabbert?



A I don't know who did the introductions.

Q Do you have a recollection that somebody introduced a special master to Mr. Gabbert?

A No. I don't know. I can't recall who, if anyone, did that.

Q Mr. Oppenheim, then, left your view to go off with Mr. Gabbert, did he?

A Correct.

Q He went into a room?

A Yes.

Q And then closed the door?

A Correct.

Q And you went into the Grand Jury room?

A I don't know that they closed the door. I don't remember watching it to that extent.

Q You don't remember whether he closed the door?

A No.

Q But he went out of your sight?

A Right. I believe they went out of my sight at that point.

Q Did you then proceed into the Grand Jury room itself?

A Yes. I believe at that point I went to the [p. 115] Grand Jury room.

Q You had not read the provisions of 1524 that morning, as I recall your testimony?

A Correct.

Q Were you aware of the requirements and procedures that Mr. Oppenheim had to follow as a special master?

A What specifically are you referring to?

Q Well, are you aware today that there are certain requirements that are placed on a master at the time he begins to execute the warrant and during the execution of the warrant?

A I haven't looked at the provisions lately.

Q Were you aware of those provisions on the morning of March the 21st?

MR. BRAZILE: The question is vague and ambiguous as to "aware of those provisions."

Do you mean that they existed, the specifics, in the entire section?

MR. LIGHTFOOT: No. In his mind on the morning of March 21, 1995.

Q Were you, Mr. Conn, aware that there were particular requirements that were placed on a special master by Section 1524 before and during the execution of a warrant under that section?

\* \* \*

[p. 122] had in your office with Mr. Gabbert that morning discussing the subject of whether he would surrender his client if the Grand Jury indicted her?



A I think he did mention that to me at one point. I don't recall when he mentioned that.

Q Do you recall that it was he, rather than you, who brought the subject up?

A I'm sure it was. Yeah.

Q You're positive you didn't bring the subject up?

A Of her surrender?

Q Yeah.

A I wouldn't say I'm positive. I seem to recall that being his concern.

Q When you saw Mr. Oppenheim - Mr. Oppenheim was an elderly man, was he?

A Yes.

Q When you saw him go off with Mr. Gabbert - you've indicated you went into the Grand Jury room?

A Yes.

Q Did Ms. Najera go with you?

A Yes.

Q And did you call Mr. Zoeller in as a witness?

A Yes.

[p. 123] Q And then he concluded?

A Yes.

Q And then was Ms. Najera's responsibility to examine Ms. Baker?

A Yes.

Q And did she go out and call Ms. Baker in as a witness?

A No. I don't think she went out. They have someone in the Grand Jury that does that.

Q And then Ms. Baker came in?

A Yes.

Q And she was questioned by Ms. Najera?

A Yes.

Q And do you recall that the first substantive question that Ms. Najera asked her was if she knew Lyle Menendez?

A Yes.

Q Do you recall Ms. Baker saying that her lawyer was being searched and she needed to go out to talk to him?

A Right.

Q And was she allowed to go out?

A Yes.

Q And how long was she gone?

A It's my recollection - I don't know how

\* \* \*

[p. 126] Q You don't?

No.

Q You say when you came out of the Grand Jury room, at some point then or shortly thereafter you became aware of Mr. Oppenheim and Mr. Gabbert?

A Right.

Q Did Mr. Oppenheim speak to you at that time?

A I don't know that he spoke to me. He indicated that -

Detective Zoeller was there. I was there. Ms. Najera was there. And he indicated in our presence that he had searched the briefcase and that he saw nothing of a privileged matter.

Q All right.

Did he indicate to you whether Mr. Gabbert had claimed to him that there were privileged documents in his possession at that time?

A No. I don't recall that.

Q Do you have a recollection that he, Oppenheim, did not relate that to you, or do you just not have a recollection as to whether he did or did not?

A I don't recall him saying anything either way.

Q How long was the conversation with [p. 127] Mr. Oppenheim?

You, Mr. Zoeller and Ms. Najera were all participants in that conversation?

A What do you mean "participants"? We were present.

Q Well, you were all standing there -

A Right.

Q - with Mr. Oppenheim?

A Right.

Q Where was it with relation to the Grand Jury room itself that you had just come out of?

A I believe that this was in the waiting room where the table and chairs are.

Q Was it outside the presence of other individuals?

A What other individuals are you referring to?

Q Paul Gabbert?

A No. Gabbert was there.

Q Did he hear the conversation you had with Mr. Oppenheim?

A What conversation?

Q The conversation in which Mr. Oppenheim, as you've just indicated, said that he didn't find any privileged information or materials.

[p. 128] A Right.

Q Was Mr. Gabbert within earshot of that conversation?

A Yes.

Q Was he standing with the group -

A Yes.

Q - To whom Mr. Oppenheim was speaking?

A Yes.

Q Did Mr. Gabbert say anything during this period when Mr. Oppenheim was advising you that he found nothing privileged in the document?

A He was saying something like, "I have nothing here."

Q Well, in fact, he was angry, wasn't he?

A Yes. He was.

Q He protested that he did not want his materials to be searched, didn't he?

A I remember him saying he had nothing here.

Q Do you recall that he protested that he didn't want anybody to search his documents?

A I don't specifically remember him saying that. He knew we had a warrant.

And he simply said, "I don't have anything here. I don't have it."

Q Was he there when Mr. Oppenheim said to the [p. 129] three of you that there was nothing privileged within the document?

A Right.

Q And he protested by claiming -

Mr. Gabbert did - that there were privileged documents, didn't he?

A No, no.

Q He didn't?

A I don't recall him claiming any privileged documents.

Q Did Mr. Oppenheim hand anything to you at that time that he had seized from Mr. Gabbert?

A No.

Q Did you see anything in his hands?

A No.

Q How long did this meeting with Mr. Oppenheim take?

A It was not a meeting. Oppenheim simply - someone put the question to him - "Did you find anything of a privileged matter?"

And what he said, "There's nothing of a privileged matter." And it was a remark that took only a moment.

Q Did you understand that that was his duty as the special master - his duty was to search through [p. 130] the documents to see if there was anything privileged in there?

A Right.

Q And if he determined that there was nothing privileged, then documents could be searched?

A Correct.

Q By whom?



A By the investigating officer.

Q Investigating officer?

A Right.

Q And what was your authority for that belief?

MR. BRAZILE: Other than the Penal Code section?

BY MR. LIGHTFOOT:

Q Is that the basis for your belief?

A And the search warrant which instructs - commands the investigating officer to search the body of the person of Paul Gabbert.

Q Doesn't it say "through Special Master Oppenheim"?

A Yes. I think what he meant there "with the assistance of."

Q "With the assistance of a special master"?

A That's correct.

Q So it was your understanding that whoever conducted the search, it had to be conducted in compliance [p. 131] with the Penal Code; isn't that right?

A Correct.

Q And particularly with the provisions of Section 1524; isn't that correct?

A Correct.

Q I gather this was just a momentary point in time where somebody put the question to Mr. Oppenheim and

he responded that there was nothing privileged; is that right?

A Exactly.

Q And was it shortly after that that Mr. Zoeller conducted the search?

A Correct.

Q And did Mr. Zoeller conduct that search at the same location where this meeting with Mr. Oppenheim had just taken place?

A Correct. Yeah.

Q And at the time that Mr. Oppenheim was speaking, were the possessions of Mr. Gabbert in Mr. Gabbert's - was he physically holding them - Mr. Gabbert?

A Gabbert was holding his briefcase.

Q His briefcase?

A Yeah.

Q Do you recall him holding anything else?

[p. 132] A No.

Q Do you have any better recollection now that he might have been holding an accordion file with documents in it?

A No.

Q Do you know what I mean by an "accordion file"?

A Yes.

Q Where you can actually see – a Redwell – where you can see the documents?

A Yes.

Q Do you understand what I'm talking about?

A Yes.

Q Do you recall that, in fact, Mr. Gabbert showed documents in a Redwell binder, an accordion file, to Mr. Zoeller?

A I remember he opened up the briefcase, and he said, "Look. I don't have it. I don't have it. Take a look."

He was holding it open for the investigating officer to take a look. And there may have been an accordion file in the briefcase. I wasn't really paying attention to what was in there.

And then Zoeller went over and flipped through it and said, "It's not there."

[p. 133] Q So Mr. Zoeller didn't seize anything?

A Right.

Q And as far as you know, Mr. Oppenheim didn't seize anything?

A Correct. I don't remember anything being seized.

Q For the sake of refreshing your recollection or changing your recollection, I will tell you that yesterday Ms. Najera testified that she had a recollection of either Mr. Zoeller or Mr. Oppenheim taking something from Gabbert.

MR. BRAZILE: Well, is that – I don't recall that.

MR. LIGHTFOOT: That's my recollection.

MR. BRAZILE: That's your recollection of her testimony. That's one thing. But I don't recall that being her testimony.

MR. LIGHTFOOT: That's what I recall. And she couldn't recall which it was.

Q Does that refresh your recollection that one of these two gentlemen had seized something from Mr. Gabbert?

MR. BRAZILE: Do you understand that that's his recollection of her testimony? And I don't recall it that way. And without a transcript –

So I don't want you to commit to something [p. 134] he believes to be true.

MR. MACLATCHIE: For the record, I don't recall it that way either.

MR. LIGHTFOOT: For the record, you both have bad recollections.

THE WITNESS: I did not see either one of them take documents from them.

BY MR. LIGHTFOOT:

Q In fact, have you seen the Return to this particular search warrant?

A I'm sure I saw it some time ago.

Q And nothing was seized according to the Return; isn't that right?



A Do you have the Return here?

(Whereupon a discussion was held off the record.)

MR. BRAZILE: Can I take a look at it when you're done.

MR. LIGHTFOOT: Sure.

For the record, this is attached as part of Exhibit C to the Complaint in this matter, the Return to the March 18th morning search of Mr. Gabbert.

Q Have you seen that before, Mr. Conn?

A No. I'm not even sure that I saw that before.

[p. 135] Q But that Return indicates that no property was seized.

Is that still your best recollection that no property was seized?

A My recollection is that I did not see anything taken from Mr. Gabbert.

Q Now, you recall that at some point later in the morning - by the way, do you know Mr. Richard Hirsch?

A Yes.

Q You met Mr. Richard Hirsch?

A Yes.

Q And when you met him, you understood that he was there as Mr. Gabbert's attorney; is that correct?

A Yes. I guess you can say "as his attorney."

Q At the point where you came out of the Grand Jury and listened to Mr. Oppenheim and after listening to

Mr. Oppenheim, did you direct Mr. Zoeller to search the briefcase of Mr. Gabbert?

A I remember I was involved in that conversation. I didn't direct him. I indicated - I believe I indicated to Mr. Gabbert at that point that the investigating officer would take a look at the briefcase now.

Q And you understood that to be a search?

[p. 136] A I wasn't directing the investigating officer. The investigating officer was commanded by the search warrant to conduct a search.

Q Right.

A And I advised Mr. Gabbert at that point that now the investigating officer would carry out the command of the issuing magistrate.

Q Did you ask Mr. Gabbert for his permission?

A No. Because he we [sic] had a search warrant.

Q Did you hear Mr. Zoeller ask him for his permission?

A No.

Q Did you hear anybody ask Mr. Gabbert for his permission before Mr. Zoeller conducted the search?

A Mr. Gabbert was holding onto his briefcase, and he was saying, "Here. Take a look. Take a look. It's not in here."

Q But you heard nobody ask Mr. Gabbert for his permission to search -

A Correct.

Q - isn't that correct?

Are you aware that Subsection (e), or were you aware on that morning, March 21, 1994, that Subsection (e) of 1524 provides - I'll just read this -

"Any search conducted pursuant

\* \* \*

[p. 151] State of California  
County of Los Angeles SS:

I, Joanne Hokyo, Certified Shorthand Reporter No. 9169, in and for the State of California, do hereby certify:

That prior to being examined, DAVID CONN, the witness named in the foregoing deposition, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth;

That said deposition was taken before me pursuant to Notice, at the time and place therein set forth, and was taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

I further certify that I am neither counsel for, nor related to, any party to said action, nor in anywise interested in the outcome thereof.

In witness whereof, I have hereunto subscribed my name this 17th day of August, 1995.

/s/ Joanne Hokyo  
Certified Shorthand Reporter  
For the State of California

**EXHIBIT 4**

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

PAUL L. GABBERT,	)	
Plaintiff,	)	
vs.	)	No.
	)	CV 94 4227 RSWL(Ex)
DAVID CONN, CAROL	)	
NAJERA, ELLIOT	)	
OPPENHEIM, LESLIE	)	
ZOELLER AND DOES 1	)	
THROUGH X,	)	
Defendants.	)	

**DEPOSITION OF CAROL NAJERA**

**Los Angeles, California**

**August 3, 1995**

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

PAUL L. GABBERT,	)	
Plaintiff,	)	
vs.	)	No.
	)	CV 94 4227 RSWL (Ex)
DAVID CONN, CAROL	)	
NAJERA, ELLIOT	)	
OPPENHEIM, LESLIE	)	
ZOELLER and DOES 1	)	
through X,	)	
Defendants.	)	



## DEPOSITION OF CAROL NAJERA,

taken on behalf of the Plaintiff, at 655 South Hope Street, Thirteenth Floor, Los Angeles, California 90017, commencing at 10:32 a.m., Thursday, August 3, 1995, pursuant to Notice, before Barbara Walsh, CSR #4134, RPR.

## APPEARANCES:

## FOR THE PLAINTIFF:

TALCOTT, LIGHTFOOT, VANDEVELDE  
WOEHRLE & SADOWSKY  
BY: MELISSA N. WIDDIFIELD  
MICHAEL J. LIGHTFOOT  
CARLA M. WOEHRLE (not present)  
655 South Hope Street, Thirteenth Floor  
Los Angeles, California 90017

## FOR DEFENDANTS DAVID CONN and CAROL NAJERA:

COUNTY OF LOS ANGELES  
DE WITT W. CLINTON, County Counsel  
BY: KEVIN C. BRAZILE  
Principal Deputy County Counsel  
650 Kenneth Hahn Hall of Administration  
500 West Temple Street  
Los Angeles, California 90012

## FOR DEFENDANTS ELLIOT OPPENHEIM and LESLIE ZOELLER:

FRANSCCELL, STRICKLAND, ROBERTS &  
LAWRENCE  
BY: SCOTT D. MacLATCHIE  
225 South Lake Avenue  
Penthouse  
Pasadena, California 91101-3005

\* \* \*

[p. 15] privileged as to the case, Grand Jury secrecy as well as government information and instruct her not to answer any questions about that prior case.

BY MS. WIDDIFIELD:

Q Before you examined witnesses before the Grand Jury on this occasion, were you given any training as to how to examine witnesses in front of a Grand Jury?

A No.

Q Were you given any training at all as to Grand Jury procedure?

A I was not given a class on Grand Jury procedure.

Q Were you given any guidance or instruction by any superiors in any way?

A Yes.

Q What was that instruction?

MR. BRAZILE: Don't refer to any particular case. Just in general the guidelines or rules that we have told you about.

THE WITNESS: I think there was a list of rules that they give to attorneys before they go into Grand Jury.

BY MS. WIDDIFIELD:

Q Do you remember what those rules said?

A No.

Q It's your understanding that when a witness testifies before the Grand Jury that their counsel can't be in the room with them; is that correct?

[p. 16] A Yes.

Q But that a witness may in fact ask to confer with counsel; is that correct?

A Yes.

Q Then they leave the Grand Jury room to go outside to confer with their counsel; is that correct?

A Yes.

Q In your 10-year career with the District Attorney's office, have you on occasion caused search warrants to be obtained in the course of an investigation?

A I'm not sure what you mean by "caused search warrants to be obtained."

Q When you're working on a case, I take it that you work closely with law enforcement; is that correct?

A We work with law enforcement - I don't know if you call it closely - in the prosecution of the case. Talking about the prosecution investigation.

Q Let's talk about the investigation of the case. Have there been occasions when you have worked on the investigation of a case or matters prior to the complaint being filed or an indictment being returned?

A No.

Q So you generally are not assigned to a matter until a complaint has been filed or until an indictment has been returned?

\* \* \*

[p. 26] Q Sure. As you sit here, do you have any understanding as to what those provisions are?

A I couldn't rattle them off to you. I could look it up.

Q I believe you stated you were assigned to the Menendez matter in January of 1994; is that correct?

A I was assigned to it after the first jury hung. I know they hung around January of '94. I don't remember when I was assigned but -

Q I take it David Conn is also assigned to that case?

A Yes.

Q Were you assigned together, at the same time?

A I don't know.

Q Does one of you function as lead counsel in that case?

A Yes.

Q Who would that be?

A That would be David Conn.

Q After you became assigned to the Menendez matter, did there come a point in time when you became aware that you needed additional information from Traci Baker?

A Yes.

Q When did that come about?



MR. BRAZILE: Just - well, I'm going to lodge  
an

\* \* \*

[p. 70] Q When you got back downstairs, were Mr. Conn, Mr. Gabbert and Ms. Baker back in the Grand Jury area?

A They might have all gone down together. I don't remember.

Q When you were at Mr. Conn's office, did you have any conversation with Mr. Conn alone without Mr. Gabbert and Ms. Baker?

A I may have.

Q Do you recall what that conversation was about?

MR. BRAZILE: With Mr. Conn?

MS. WIDDIFIELD: Yes.

MR. BRAZILE: Objection. That's privileged. Attorney work product as well as official government information.

BY MS. WIDDIFIELD:

Q Do you know if Detective Zoeller was in the District Attorney's office at that time?

A I believe he was.

Q Was there a decision made at some point that morning to obtain a search warrant for the person of Paul Gabbert and Traci Baker?

A For the what?

Q For the person of Paul Gabbert and Traci Baker.

A I don't believe for Traci Baker.

Q For Paul Gabbert?

A Yes.

[p. 71] Q When was that decision made?

A Sometime that morning.

Q Who made that decision?

A It was - again, in my opinion it was a joint decision.

Q Between you, Mr. Conn and Detective Zoeller?

A I believe it was Mr. Conn.

Q Was that decision made before or after the conversation with Mr. Gabbert and Ms. Baker in the hallway?

A After.

Q On what basis did you make the decision to obtain a search warrant of Mr. Gabbert?

MR. BRAZILE: Objection. Attorney work product as well as official government information. Privileged. The witness is instructed not to answer. I believe the search warrant speaks for itself. (Mr. MacLatchie exits deposition room.)

BY MS. WIDDIFIELD:

Q Did Mr. Gabbert and Ms. Baker leave Mr. Conn's office by themselves, do you know?

A I don't.

Q Do you know if they left with Mr. Conn?

A I don't remember.

Q Was a decision made to obtain a search warrant before they left Mr. Conn's office?

\* \* \*

[p. 85] A Yes.

Q And you understand that she was represented by Paul Gabbert on that Monday morning, didn't you?

A I knew Monday morning when she was there that she was represented by Paul Gabbert, yes.

Q And you understood he was there because he was representing her before the Grand Jury?

MR. MACLATCHIE: Objection. Vague.

MR. BRAZILE: Wait. Objection. The question is vague and ambiguous plus inaccurate because you cannot represent somebody at the Grand Jury.

BY MS. WIDDIFIELD:

Q Mr. Gabbert's presence at the Criminal Courts Building on Monday, March 21 was in his capacity as counsel for Ms. Baker while she was testifying before the Grand Jury; isn't that correct?

A He identified himself as her attorney.

Q You understood him to be there because his client was testifying before the Grand Jury; isn't that correct?

MR. BRAZILE: Objection. Lack of foundation. Do you want to assume that or why don't you ask her if he told her that?

MS. WIDDIFIELD: Let's see if the witness can answer.

THE WITNESS: He stated he was there and he was her attorney.

MR. BRAZILE: Did he say that?

[p. 86] BY MS. WIDDIFIELD:

Q You tell us -

A Not that I remember.

Q You had an understanding why he was there?

MR. BRAZILE: Objection as to what her understanding was. If she can answer the question -

If you didn't have an understanding, tell her. If you did, tell her.

THE WITNESS: I understood he was there as her attorney.

BY MS. WIDDIFIELD:

Q Let me put it this way: He wouldn't have been there representing her as his client if his client hadn't been testifying before the Grand Jury; isn't that true?

A Yes.

MS. WIDDIFIELD: Off the record.

(Recess taken.)

MS. WIDDIFIELD: Let's go back on.

Q After the warrant for Mr. Gabbert was obtained, what did you then do?



A Well, sometime after the warrant was obtained we were all back in the Grand Jury room.

Q Did you go there with Mr. Conn?

A I think so.

Q Did you go in with Mr. Oppenheim?

A I don't remember for certain.

[p. 87] Q You don't recall all of you going together?

A I don't actually recall going down there, is the problem.

Q You don't recall getting there? You just got there?

A Yes.

Q Who was there when you got there to the Grand Jury room? Well, we'll describe it as the Grand Jury area.

A As I recall, myself, Mr. Conn, Les Zoeller, Mr. Oppenheim, Paul Gabbert, Traci Baker, the bailiff, I think Kathy is her name, the secretary, Grand Jury advisor. I think that's it.

Q All of these people were there at the same time.

A In the general area of the Grand Jury area.

Q So what time would that have been?

A I couldn't tell you. In the morning.

Q And the advisor, is that Terry White?

A Yes.

Q And the bailiff, was that Timothy Fox?

A Never knew him. I still don't know him.

Q When you got there, then what happens?

A At some point, Detective Zoeller told Mr. Gabbert that he had the search warrant.

Q Had you given Detective Zoeller any instruction what to do with the warrant once he obtained it that morning?

[p. 88] A I personally?

Q Yes.

A I don't recall giving him instructions.

Q Do you recall whether Mr. Conn did?

A No.

Q Detective Zoeller introduced himself to Mr. Gabbert; is that correct?

A I don't know if he did it then or if he'd already done it but he was there with Mr. Gabbert.

Q Where was Ms. Baker at this point?

A She was in the room.

Q In the Grand Jury room?

A Not -

MR. BRAZILE: When you're saying -

MS. WIDDIFIELD: That's what I'm trying to clarify.

Q What do you mean?

A She was in the Grand Jury area.

Q So we're talking about the anteroom. Would that be a fair way to describe it?

A Just call it the lobby.

Q Okay.

A Okay.

Q So if I'm correct, at this point present in the lobby were you, Mr. Conn, Mr. Gabbert, Detective Zoeller, Mr. Oppenheim, Ms. Baker, Mr. White, Kathy, the secretary, and the [p. 89] bailiff.

Kathy Spahn (phonetic)? Is that the secretary you're referring to?

A I don't know what her last name is.

Q Was Patti Jo Fairbanks there?

A She was in and out, yes.

Q What was she doing there?

A I don't really know.

Q Did she normally accompany Mr. Conn if he was going to appear before the Grand Jury?

A Not Mr. Conn but whoever she was working with on any given day.

Q What was she there for? What was her role?

A You'd have to ask her.

Q Okay. After Detective Zoeller introduced himself to Mr. Gabbert, what happened next?

A Well, somehow he acknowledged his presence and he served the search warrant.

Q What happened next?

A Then Mr. Oppenheim and Mr. Gabbert went into what I'll call the anteroom.

Q And where is Ms. Baker at this point?

A She's still floating around in the lobby.

Q Where are you?

A I'm floating around in the lobby as well.

[p. 90] Q Did Mr. Gabbert ask to be taken to a private room?

A I believe so.

Q What did Mr. Oppenheim say to Mr. Gabbert?

A I don't remember.

Q Did Mr. Oppenheim, have with him any envelopes that he might use to seal documents?

A He may have, but I don't remember.

Q Did he have a pad of paper to take notes?

A I think he may have. I don't really have a clear picture of it, but I think he may have.

Q Do you know if he took any notes that morning?

A Not that I was ever made aware of.

Q Did you ever tell Mr. Oppenheim to keep track of what he looked through and whether he took any documents?



A I didn't give him any instructions.

Q Do you know whether Mr. Conn did?

A I don't know.

Q Do you know whether Detective Zoeller did?

A I don't know.

Q Do you know if Mr. Oppenheim ever met with Judge Pounders on that morning?

A I was not aware that that ever happened.

Q Did you see Mr. Oppenheim, and Mr. Gabbert go into what you refer to as an anteroom?

[p. 91] A (Witness nods head.)

Q Was there a door?

A Yes.

Q Was the door open or closed after they went in?

A It was closed.

Q And you and Mr. Conn both watched Mr. Gabbert go into the room?

A I did. I don't know if he did.

Q What did you do then?

A I just waited around in the lobby.

Q At some point did you go in the Grand Jury room?

A Yes.

Q Did Mr. Conn go with you?

A Mr. Conn went first.

Q He went first?

A (Witness nods head.)

Q Did Mr. Conn go into the Grand Jury room while Mr. Gabbert and Mr. Oppenheim were still in the anteroom?

A I don't believe so.

Q Did you see Mr. Gabbert, and Mr. Oppenheim come out before you went into the Grand Jury room?

A Yes.

Q Did you see Mr. Oppenheim, and Mr. Gabbert come out before Mr. Conn went into the Grand Jury room?

A Yes.

[p. 92] Q Was Ms. Baker called to testify before the Grand Jury that morning?

A Yes.

Q When?

A I couldn't say the exact time.

Q You examined her, didn't you?

A Yes.

Q Who actually called her into the room? You did?

A I did.

Q Did you call her into the room - strike that.

Was Ms. Baker called into the Grand Jury room while Mr. Gabbert was with Mr. Oppenheim?

A No.

Q So your testimony is that you waited in the lobby area until Mr. Oppenheim and Mr. Gabbert came out before going into the Grand Jury room?

A I seem to recall I was in the lobby. I remember when they went in and I seem to recall them coming out.

Q But you'd gone into the Grand Jury room before they came out, didn't you?

A I seem to recall them coming out and then I was in the Grand Jury room.

Q How long were you waiting in the lobby before they came out?

A No idea.

[p. 93] Q Was anybody else there waiting with you?

A There were a lot of people milling about. The bailiff, those - Kathy. Those people. Do I have a memory of somebody standing by my side? No.

Q Where was Detective Zoeller?

A I don't remember.

Q Did he testify before the Grand Jury that morning?

A Yes.

Q When did he testify?

A That morning.

Q Where did he go after he served the warrant on Mr. Gabbert?

A He was kind of hanging around the waiting room.

Q Wasn't he before the Grand Jury while Mr. Gabbert was with Mr. Oppenheim?

A No. Because I was in the lobby. I remember that.

Q When Mr. Oppenheim and Mr. Gabbert came out of what you referred to as the anteroom, what happened next?

A They went into the waiting room.

Q Did you have a discussion with Mr. Oppenheim?

A I didn't actually have a discussion, no.

Q Did you talk to him?

A No.

[p. 94] Q Did he say anything to you?

A Not to me.

Q Did he say anything to Mr. Conn?

A Yes.

Q What did he say?

A They had a discussion.

Q Did you overhear the discussion?



A Yes.

Q What was said during this discussion?

A Mr. Oppenheim said that there was nothing privileged in any of the documents that he examined.

Q Did Mr. Conn ask him what the basis for his decision was?

A I believe he may have. But I don't recall the response.

Q What did Mr. Conn then do?

A I don't recall what Mr. Conn did.

Q What did you do?

A I was standing there. And then -

Q Had Mr. Oppenheim seized any document from Mr. Gabbert?

A I think so.

Q Do you recall what that document was?

A I think it was a letter that Traci Baker had. It may have been all of it.

[p. 95] Q What did Mr. Oppenheim do?

A I don't know if he seized it or he had the bailiff seize it.

Q But it was that morning?

A I believe it was that morning or it might have been Mr. Gabbert pulled it out. I don't remember.

Q Where did that letter end up?

A It's in evidence, I believe. On the return.

Q Wasn't it on the return of the search warrant or shouldn't it have been?

A Yes.

Q The document that either Detective Zoeller or Mr. Oppenheim received from Mr. Gabbert, that was in fact the document that both the Grand Jury subpoena and the search warrant sought, wasn't it?

A Not technically.

Q That's what you were looking for, wasn't it? A letter from Lyle Menendez to Traci Baker?

A That's what we were looking for, but that's not what we got.

Q I thought you just stated that's what you got.

MR. BRAZILE: Well, objection -

BY MS. WIDDIFIELD:

Q What else were you looking for if that wasn't it?

A The rest of the letter.

[p. 96] Q Why did you believe Mr. Gabbert would have the letter?

MR. BRAZILE: Objection. Calls for attorney work product. Privileged government information. Instruct her not to answer.

BY MS. WIDDIFIELD:

Q Subsequent to receiving or obtaining that letter, did Ms. Baker testify before the Grand Jury?

MR. BRAZILE: When you say after she got the letter, from Gabbert?

BY MS. WIDDIFIELD:

Q After either Mr. Oppenheim or Detective Zoeller obtained that letter from Mr. Gabbert, did Ms. Baker testify before the Grand Jury?

A We had that letter, a portion of the letter, before Ms. Baker testified before the Grand Jury.

Q If Mr. Gabbert gave you or - strike that.

If everything that Mr. Gabbert had in his possession that was responsive to the search warrant was obtained from him -

A Uh-huh.

Q - okay, why did you still call Traci Baker before the Grand Jury?

MR. BRAZILE: Counsel, same objection. Attorney work product as well as official government information.

[p. 97] For the last time, the witness will be instructed not to answer any questions concerning the thought processes with regards to the Grand Jury testimony or the Menendez case.

MR. MACLATCHIE: Also, lacks foundation.

MS. WIDDIFIELD: With respect to your objection, that's fine, but I obviously need to make a record. I've got to ask the questions.

MR. BRAZILE: I know.

MS. WIDDIFIELD: You can just keep saying "same objection."

MR. BRAZILE: Okay. I'll say that and instruct her not to answer -

MS. WIDDIFIELD: Well, I appreciate that, but I've got to ask the questions.

MR. BRAZILE: Sure.

BY MS. WIDDIFIELD:

Q When the warrant was served on Mr. Gabbert in the lobby of the Grand Jury area, did he object to the service of the warrant?

A He was upset.

Q Did he say something to the effect of "Hey, my client has got to testify before the Grand Jury. Wait a minute"?

A He started - he didn't say that, no.

Q What did he say?

A He just started ranting - I don't really recall [p. 98] what he said.

Q Did he ask that you delay the search until his client was through testifying?

A I don't recall him asking that, no.



Q You knew she was about to be testifying, though, within a minute?

A No.

Q You knew she was going to be testifying that morning, didn't you?

A Yes.

Q Why didn't you wait to execute the warrant until Ms. Baker was through with her testimony?

MR. BRAZILE: Same objection.

BY MS. WIDDIFIELD:

Q Why did you serve the warrant at the time you did?

MR. BRAZILE: Same objection. Same privilege objection.

BY MS. WIDDIFIELD:

Q You could have waited until Mr. Gabbert returned to his office, couldn't you?

MR. BRAZILE: Same privilege.

BY MS. WIDDIFIELD:

Q After Mr. Oppenheim told Mr. Conn that he had not found anything privileged in Mr. Gabbert's possessions, what happened then?

[p. 99] A I believe Detective Zoeller was then going to search for the documents we were looking for.

Q Did you direct Detective Zoeller to conduct that search?

A No. I was just standing there.

Q Did Mr. Conn direct Detective Zoeller to conduct that search?

A I can't recall exactly what Mr. Conn told him.

Q Did Mr. Gabbert give - strike that.

Did Detective Zoeller ask Mr. Gabbert's permission to search his possessions?

A I don't believe so.

Q Had you recently read Penal Code Section 1524 before searching Mr. Gabbert on March 21?

MR. BRAZILE: Recently? You mean that day -

BY MS. WIDDIFIELD:

Q Within the last week, yes.

A I'm sure I had, but I don't remember it right now.

Q Had you taken a look at what is in front of you, what has been marked as Exhibit 1 in the deposition of Detective Zoeller, the Search Warrant Manual? Had you reviewed the manual prior to the search of Mr. Gabbert?

A I may have but I don't recall.

Q I'd like to direct your attention to again [p. 100] Section Roman II-8, Subsection M. You see there are some cases cited there regarding the use of a Special Master? Do you see that?

A (Witness nods head.)

Q Had you read any of those cases prior to the warrant being served on Mr. Gabbert?

A You say within the week?

Q Well, the last six months.

MR. BRAZILE: Well, I'll object as to the relevancy.

MS. WIDDIFIELD: Mr. Brazile, what I'm trying to establish -

MR. BRAZILE: Can I finish? I'll object as to the relevancy. I'll let the witness answer the question. Okay?

BY MS. WIDDIFIELD:

Q Can you answer the question?

A Yes. And I don't remember if I did or not.

Q Had you looked at Penal Code Section 1524 in the last six months?

MR. BRAZILE: Objection. On the grounds of relevance. The witness may answer the question.

THE WITNESS: I'm sure I have but I don't remember actually doing it as I sit here right now.

BY MS. WIDDIFIELD:

Q Had you looked at the provisions in Section 1524 regarding Special Masters?

[p. 101] MR. BRAZILE: In the last six months?

MS. WIDDIFIELD: Yes.

MR. BRAZILE: Same relevancy objection.

THE WITNESS: I'm sure I had but I don't recall, as I sit here, doing it, but -

BY MS. WIDDIFIELD:

Q Are you aware that Section 1524 requires the permission of the person being searched if anybody other than a Special Master is going to search that person?

A Is that what you're telling me now?

Q That is what I'm telling you now.

A Okay.

Q Were you aware of that provision in Section 1524 at the time of search of Mr. Gabbert?

A I don't remember right now, so - I don't know if I was aware or not. But I reviewed this before I came, so -

Q When Detective Zoeller - did you watch Detective Zoeller - strike that.

Did you see Detective Zoeller search Mr. Gabbert's possessions?

A Yes.

Q Where were you standing in relation to Detective Zoeller? How far away were you standing from him when he was searching Mr. Gabbert?

A I was in the same room with them.

[p. 102] About how far away?

A Catercorner.

Q In terms of feet? Two feet?

A I couldn't tell you.

Q Less than six feet?



A No idea.

Q Further away than this table?

A (Witness shakes head.) I would have to go down to the Grand Jury room and take a look again. I can't tell you how big the table was.

Q Could you see the things that Detective Zoeller was looking through?

A Yes. I could see.

Q Mr. Conn could see as well, couldn't he?

A Yes.

Q Did either you or Mr. Conn ask Mr. Gabbert's permission to look at his possessions?

A I didn't, no.

Q Do you know if Mr. Conn did?

A I don't believe he did.

Q What happened after Detective Zoeller, you and Mr. Conn finished looking at Mr. Gabbert's possessions?

A I believe at some point after that I went into the Grand Jury room.

Q Did you do anything else before going into the

\* \* \*

[p. 132] STATE OF CALIFORNIA )  
 ) ss:  
COUNTY OF LOS ANGELES )

I, Barbara Walsh, CSR #4134, certify:

That the foregoing deposition of CAROL NAJERA was taken before me pursuant to Notice at the time and place therein set forth, at which time the witness was put under oath by me;

That the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed;

That the foregoing deposition is a true record of the testimony and all objections made at the time of the examination.

IN WITNESS WHEREOF, I have subscribed my name this 15th day of August, 1995.

/s/ Barbara Walsh

\_\_\_\_\_

## EXHIBIT 5

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
DAVID CONN, CAROL NAJERA,	)	No. CV 94
ELLIOT OPPENHEIM,	)	4227 RSWL(Ex)
LESLIE ZOELLER	)	
AND DOES 1 THROUGH X,	)	
Defendants.	)	
_____	)	

DEPOSITION OF LESLIE ZOELLERLos Angeles, California  
August 1, 1995UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
DAVID CONN, CAROL NAJERA,	)	No. CV 94
ELLIOT OPPENHEIM,	)	4227 RSWL(Ex)
LESLIE ZOELLER	)	
AND DOES 1 THROUGH X,	)	
Defendants.	)	
_____	)	

## DEPOSITION OF LESLIE ZOELLER,

taken on behalf of the Plaintiff, at 655 South Hope Street, Thirteenth Floor, Los Angeles, California 90017, commencing at 10:21 A.M., Tuesday, August 1, 1995, pursuant to Notice, before Joanne Hokyo, CSR #9169.

## APPEARANCES:

## FOR PLAINTIFF PAUL L. GABBERT:

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Los Angeles, California 90012

\* \* \*

[p. 61] THE WITNESS: Up to speed on the  
Menendez case, yes.



BY MS. WIDDIFIELD:

Q Did you ever speak with Mr. Gabbert in February, 1994?

A Not that I recall, no.

Q So you had no knowledge of Paul Gabbert prior to going to Traci Baker's house to attempt to interview her; is that correct?

A That's correct.

Q And you had never spoken with him prior to?

A That's correct.

Q When you first had the discussion with Mr. Conn as to serving a Subpoena, a Grand Jury Subpoena on Traci Baker, how was it determined that you were going to do that? Were you going to attempt to serve the Subpoena on her counsel or on Ms. Baker directly?

A I wanted to serve Ms. Baker directly.

Q And was that what you initially attempted to do?

A What do you mean by "initially"? Are you assuming that I attempted service of a Grand Jury Subpoena on Traci Baker more than the one time?

Q Why don't you explain to me how you served the Grand Jury Subpoena on Traci Baker.

[p. 62] A It was arranged through Mr. Gabbert and David Conn that Traci Baker would be at Mr. Gabbert's office on the 17th of -

MR. MACLATCHIE: March.

THE WITNESS: - March of 1994.

And a 1:00 appointment was set up. Unfortunately, I couldn't make it until 1:30. And at that point, I served Traci Baker, personally, a Grand Jury Subpoena in Mr. Gabbert's conference room.

BY MS. WIDDIFIELD:

Q Did you have any contact with Mr. Gabbert prior to serving the Subpoena in his office?

A I don't believe so. I might have spoken to him on the phone in reference to Ms. Baker, but I don't recall.

Q Do you recall when that might have been?

MR. GRANBO: Calls for speculation in light of his answer.

THE WITNESS: No.

BY MS. WIDDIFIELD:

Q So I take it you arrived at Mr. Gabbert's office at approximately 1:30 on March 17th; is that correct?

A That's correct.

Q Was Ms. Baker there?

[p. 63] A Yes.

Q And you, in fact, served the Subpoena at that time?

A Yes.

Q Did you have any discussions with Ms. Baker at that time?

A Discussions in reference to what?

Q Any conversation with Ms. Baker at all?

A I don't believe so, no. Except for pleasantries, no.

Q Did you have any conversations with Mr. Gabbert at that time?

A No.

Q Did you at any time state that you were interested in seeking Ms. Baker's cooperation?

A I don't recall. I might have told Ms. Baker that we wanted her cooperation at the time that I attempted an interview with her. I might have even said that in front of Mr. Gabbert when I served her the Subpoena. I don't recall.

Q Was it ultimately determined to obtain a search warrant for Traci Baker's house on March 17, 1994?

A Yes.

Q And when was the decision made to obtain a search warrant?

[p. 64] A I believe on the 17th of March.

Q Was it before or after you served the Grand Jury Subpoena?

MR. MACLATCHIE: I'm going to object at this point. I think the witness can testify that there was a search warrant served and the date it was served.

But since, as I stated earlier, I don't believe - it is not appropriate in this case to litigate the validity, the constitutional validity of that search. I don't believe that any

questions pertaining to the obtaining of that warrant and what went into it is really appropriate since it is the fruits of that warrant's service which formed the basis for the application for the courthouse search warrant in this case.

MS. WIDDIFIELD: Which makes it completely relevant because it is the fruits of that search. So to that extent I'm entitled to go into how that search came about, the process of that search, what that search resulted, and how it led up to what we referred to as the "courthouse search."

MR. MACLATCHIE: You're certainly entitled to what resulted from the search, but there's already been a judicial determination of the 4th amendment validity of the search. So what went into the search warrant application and all of that is not germane or material.

\* \* \*

[p. 72] (Whereupon a recess was taken.)

BY MS. WIDDIFIELD:

Q When we left off, we just had arrived at Traci Baker's house to serve the search warrant on March 18th.

A That's correct.

Q And can you describe for me what happened when you arrived at Ms. Baker's house?

A We knocked on the door.

Q And when you say "we," is it all four of you - Conn, Najera -

A We were all at the door. I don't know who knocked on the door. I believe I did.



She answered the door. And I served the search warrant. I gave her - gave her a copy showing her the original or vice versa. But she ended up with the copy of the search warrant.

Upon reading the search warrant, she made a statement, "I shouldn't tell you this, but all the things that you're looking for are with my attorney."

Q How did this statement come about?

Did she just read the search warrant and spontaneously state that to you?

A That's correct.

Q Did she at any time say that she wanted her

. . .

[p. 88] A After I had the search warrant signed by the Judge, I met up with him, I believe, in the hallway. I don't remember what floor the Grand Jury room is on.

Q But outside of the Grand Jury area?

A Correct.

Q Was he at that time by himself?

A No.

Q Who was he with?

A He was with Carol Najera, David Conn and the secretary, Patty Jo Fairbanks.

Q What was Ms. Fairbanks doing there, if you know?

A She's the secretary for David Conn.

Q Was she there for any particular reason?

A No.

Q How long was she there? Do you know?

A I don't recall.

Q Did you have a conversation with Ms. Najera, Mr. Conn and Mr. Oppenheim in the hallway?

A Yes.

Q Do you recall the substance of that conversation?

A No.

Q Did you see Mr. Gabbert and Ms. Baker anywhere in the Grand Jury area at that time?

[p. 89] A I believe we first saw them in the hallway of the hallway - the court hallway outside of the Grand Jury room.

Q It was your understanding that Mr. Gabbert and Ms. Baker had already met with Mr. Conn at that point?

MR. MACLATCHIE: Objection. Speculation.

BY MS. WIDDIFIELD:

Q You can answer.

A I know that Mr. Gabbert had met with Mr. Conn earlier that morning because that was the substance of the search warrant. Whether Ms. Baker was with him or not, I don't know.

Q If you could tell me what happened after you got to the hallway in the Grand Jury area -

A Whether it occurred outside or within the - I don't know whether you've been to the Grand Jury room itself.

Q Yes.

A But there's actually a counter or an area where you go into an office area. And then from there, there's another room which is a waiting room for the Grand Jury and then the Grand Jury itself.

I know that we met Mr. Gabbert and Traci Baker outside in the hallway. And at what point -

Q Did you speak with him at that point?

[p. 90] A Yes. I had already introduced myself to him when I served Traci Baker the Grand Jury Subpoena the week prior. And I just exchanged pleasantries with them. And at some point - as I said, it was either outside or just inside the Grand Jury area there - he was advised that there was a search warrant for the paperwork, for the correspondence between Lyle Menendez and Traci Baker.

Q Who advised Mr. Gabbert of that?

A I assume when you say "him," you mean Mr. Gabbert?

Q That's correct.

A I believe I did. And at the same time, Elliott Oppenheim chimed in and introduced himself.

Q Do you recall what happened next?

A Next I know that Elliott Oppenheim, for lack of a better term, took over the situation and stated that they

wanted to go to a room where they could be alone as far as conducting the search in confidence.

Q Do you know whether Mr. Gabbert requested that?

A I don't recall.

Was it at the suggestion of Mr. Oppenheim?

A I don't recall.

A But I know that they went into a room - as I said, the first door that you go into as far as the [p. 91] Grand jury room is like an office area with a counter. And they went in a back room behind that counter.

Q Mr. Oppenheim have any envelopes with him?

A I don't recall.

Q He was there as a special master to search an attorney; is that correct?

A That's correct.

Q And if he found any confidential or privileged material, he was supposed to seal that material; is that correct?

MR. MACLATCHIE: Objection. Calls for a legal conclusion from the witness.

BY MS. WIDDIFIELD:

Q You can answer, if you know.

MR. MACLATCHIE: Objection. Calls for speculation as to what privileged material is, as to whether there was anything waived about it, whether he's still



entitled to look at it and make note of what it is before it's put into the envelope. I think there's too many variables. I don't think it's a proper question.

BY MS. WIDDIFIELD:

Q Based on your knowledge and experience of a special master, I take it, it is your understanding that if a special master is aware of what he believes to be

\* \* \*

[p. 95] MS. WIDDIFIELD: Are you directing him not to answer?

MR. MACLATCHIE: Can you answer that question?

THE WITNESS: Yes.

MR. MACLATCHIE: Go ahead.

THE WITNESS: I was aware that if the person being served the search warrant or searched claimed confidentiality, anything that he claims confidential, should be sealed and taken to court.

BY MS. WIDDIFIELD:

Q Thank you very much.

Did you at any time witness Mr. Oppenheim search any of Mr. Gabbert's belongings?

A No.

Q I believe you stated that Mr. Oppenheim went into a separate room with Mr. Gabbert; is that correct?

A That's correct.

Q Were you ever present in that room?

A No.

Q Prior to going into the room with Mr. Oppenheim, did Mr. Gabbert say anything in response to being served with a warrant?

A I'm sure he did. I don't recall what he said, though. I knew that he became very upset.

[p. 96] Q How did you know that he became very upset?

A By his tone.

Q Do you recall in specific anything he said?

A No.

Q Can you describe his tone?

A Angry. Upset.

Q When Mr. Oppenheim went into the separate room with Mr. Gabbert, what did you then do?

A I remained in the waiting area or the conference area of the Grand Jury.

Q Was anybody with you at that time?

A Yes.

Q And who was that?

A I believe Traci Baker was there. At some point in time, Carol Najera and David Conn were there, plus the bailiff.

Q And who was that?

Do you know the bailiff?

A I believe his last name is Fox.

Q Timothy Fox - is that -

A I don't know his first name.

Q Can you tell me how long Mr. Oppenheim was with Mr. Gabbert?

A No.

Q Do you have any idea?

[p. 97] A No.

Q How long were you in the waiting room?

A I was in the waiting room for approximately 15 minutes, maybe 20.

Q And were Mr. Conn and Ms. Najera there the entire time?

A No.

Q Do you know where they went?

A They went into the Grand Jury room.

Q At some point was Ms. Baker called to testify before the Grand Jury?

A At some point, yes.

Q While you were in the waiting room?

A Yes.

Q So it was while Mr. Oppenheim was with Mr. Gabbert?

MR. MACLATCHIE: Objection. Calls for speculation. He's indicated they were out of sight.

BY MS. WIDDIFIELD:

Q Are you aware whether Ms. Baker was called to testify while Mr. Gabbert was with Mr. Oppenheim?

A No. I'm not sure whether that happened because I was called as a witness in the Grand Jury room first, and Traci Baker was after me.

Q Okay.

[p. 98] A I don't know where they were. I don't know when they came back, into the room, at what point. So I can't answer that.

Q How long did you testify before the Grand Jury?

A Approximately a half hour.

Q How long were you waiting with Traci Baker in the waiting room before you were called to testify?

A 15 to 20 minutes.

Q When you came out from testifying before the Grand Jury, did you have any understanding where Mr. Oppenheim or Mr. Gabbert were?

A I believe when I came out, they were in the waiting area of the Grand Jury room.

Q And you became aware at some point that Ms. Baker was called to testify before the Grand Jury?

A That's correct.

Q And do you know was Mr. Gabbert in the vicinity when Ms. Baker was called to testify?



MR. MACLATCHIE: Objection. Vague.

BY MS. WIDDIFIELD:

Q You can answer if you can.

A I'm not sure. Only because when I came out of the Grand Jury room, I know that Traci Baker was going in. And when I came out of the Grand Jury room, itself, [p. 99] Mr. Gabbert was in the waiting area.

Q After you came out from testifying before the Grand Jury, what did you then do?

A I sat down in the waiting room.

Q And then what did you do?

A At some point I spoke to Mr. Oppenheim.

Q Mr. Oppenheim and Mr. Gabbert were in the waiting room with you at this time?

A That's correct.

Q And at that time you had a conversation with Mr. Oppenheim?

A Yes.

Q And what was that conversation?

A Mr. Oppenheim stated that he searched Mr. Gabbert and his property and did not find what was on the search warrant, being the letters from Lyle Menendez to Traci Baker.

Q Was Mr. Conn or Ms. Najera present during this conversation?

A I don't recall. I know that they were either present at that time or he repeated it a couple minutes later when they were present.

Q Was Mr. Gabbert saying anything at this point?

A I don't recall whether he said anything or [p. 100] not.

Q Ms. Baker is before the Grand Jury at this point; is that correct?

MR. MACLATCHIE: As far as you know.

THE WITNESS: As far as I know, that's correct.

BY MS. WIDDIFIELD:

Q Did you at any time search Mr. Gabbert or his possessions?

A Yes.

Q How did that come about?

A After Mr. Oppenheim told me that he didn't find anything as far as what was on the search warrant and he related that to David Conn and Carol Najera, "they," being Carol Najera and David Conn wanted - I'm trying to get the sequence straight here.

At one point Mr. Oppenheim said that there was nothing confidential within his possession. And at that point, David Conn and Carol Najera instructed me to search his briefcase or his paperwork.

Q When Mr. Oppenheim said there was nothing confidential, was this before or after he stated that he searched Mr. Gabbert and didn't find anything responsive to the warrant?

A It was after.

Did he indicate the basis upon which he [p. 101] determined that nothing was confidential?

A No. He did not.

Q Did you ask Mr. Gabbert if you could search his possessions?

Did you ask him for permission?

A I'm not sure whether I asked his permission or whether I advised him that I was going to look through his property.

Q I'd like to direct your attention back to Exhibit 2, which is a copy of Penal Code section 1524. And I would like you to take a look at subsection (3)(e) the second sentence of that section, just the whole section.

A (Witness complies.)

Okay.

Q Have you ever read that section before?

A I have not.

Q Isn't it true that 1524(3)(e) states that nobody but the special master is to search the attorney or a doctor without permission of the person being searched?

MR. MACLATCHIE: Objection. The statute speaks for itself.

Instruct the witness not to answer.

BY MS. WIDDIFIELD:

Q Do you have an understanding of what that [p. 102] provision states?

MR. MACLATCHIE: Objection. That's that same question, asking it a different way.

By MS. WIDDIFIELD:

Q If you can recall for me, Detective Zoeller, what specifically of Mr. Gabbert's possessions you searched.

A When David Conn and/or Carol Najera instructed me to search the items that Elliott Oppenheim deemed not confidential, Mr. Gabbert became very hostile, for lack of better words, and he in turn, opened up his briefcase or folder, whatever he had, and he just started going through - "See, this is what this is."

I never actually touched any of his property. He just started going through the stuff and explaining what each thing was. And as he was doing that, I was looking. That's what it amounted to.

Q Did Mr. Gabbert at any time state that he had provided to Mr. Oppenheim the only document in his possession which was responsive to the search warrant?

A Not that I recall, no.

Q Did he at any time state that what was being viewed was confidential material?

A Not in front of me, no. He was just angry and was just explaining what each thing was.

[p. 103] Q Are you aware whether he stated that to Mr. Oppenheim?



MR. MACLATCHIE: Objection. Speculation.

BY MS. WIDDIFIELD:

Q You can answer, if you know.

A Stated what to Mr. Oppenheim?

Q That any or all of the documents in his possession were confidential or privileged?

A No.

Q At this point in time after you had looked at Mr. Gabbert's documents, do you know whether Mr. Conn or Ms. Najera looked at or looked through Mr. Gabbert's possessions?

A Not that I'm aware of. They were present while he was going through his tirade.

Q So they were looking in the same manner you were?

A I was closer than they were. So I'm not - I don't know whether they were looking at the articles or not.

Q About how far away were you from Mr. Gabbert?

A I was standing at a table, a conference table similar to this one, and Mr. Gabbert was, I believe - I was on one side, and he was on the other side [p. 104] as you are to me.

Q And where were Mr. Conn and Ms. Najera standing?

A They were at the end of the conference table, probably about five or six feet away.

Q And Mr. Oppenheim was present during this period as well?

A I believe so, but I don't have a clear recollection where he was.

Q And Ms. Baker - where was she?

A She was there also. Because at the time when Carol Najera and David Conn had come out of the Grand Jury room, they had taken a break. So everybody was out as far as witnesses and the attorneys.

Q Were you ever aware that there came a point in time when Ms. Baker sought to make contact with her lawyer, with Paul Gabbert, and he was not available?

MR. MACLATCHIE: Objection. Lacks foundation.

BY MS. WIDDIFIELD:

Q You can answer, if you can.

A No. I was not aware of that.

Q Did you ever hear her ask for her lawyer?

A No.

Q When you were in the waiting room with her, did she ever express any concern to you about the

. . .

[p. 119]

State of California       )  
                                       ) SS:  
 County of Los Angeles    )

I, Joanne Hokyo, Certified Shorthand Reporter No. 9169, in and for the State of California, do hereby certify:

That prior to being examined, Leslie Zoeller, the witness named in the foregoing deposition, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth;

That said deposition was taken before me pursuant to Notice, at the time and place therein set forth, and was taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

I further certify that I am neither counsel for, nor related to, any party to said action, nor in anywise interested in the outcome thereof.

In witness whereof, I have hereunto subscribed my name this 11th day of August, 1995.

/s/ Joanne Hokyo  
 Certified Shorthand Reporter  
 For the State of California

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**EXHIBIT 6**

**UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA**

PAUL L. GABBERT,	)	
Plaintiff,	)	
	)	
vs.	)	No. CV 94
DAVID CONN, CAROL NAJERA,	)	4227 RSWL(Ex)
ELLIOT OPPENHEIM, LESLIE	)	
ZOELLER	)	
AND DOES 1 THROUGH X,	)	
Defendants.	)	

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**DEPOSITION OF ELLIOTT OPPENHEIM**

**Beverly Hills, California  
 June 30, 1995**

**UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA**

PAUL L. GABBERT,	)	
Plaintiff,	)	
	)	
vs.	)	No. CV 94
DAVID CONN, CAROL NAJERA,	)	4227 RSWL(Ex)
ELLIOT OPPENHEIM, LESLIE	)	
ZOELLER	)	
AND DOES 1 THROUGH X,	)	
Defendants.	)	

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## DEPOSITION OF ELLIOT OPPENHEIM,

taken on behalf of the Plaintiff, at 1215 Beverly Estate Terrace, Beverly Hills, California 90210, commencing at 1:47 P.M., Friday, June 30, 1995, pursuant to Notice, before Joanne Hokyo, CSR #9169.

## APPEARANCES:

## FOR PLAINTIFF PAUL L. GABBERT:

TALCOTT, LIGHTFOOT, VANDEVELDE,  
WOEHRLE & SADOWSKY  
BY: MELISSA N. WIDDIFIELD  
655 South Hope Street  
Thirteenth Floor  
Los Angeles, California 90017

FOR DEFENDANTS ELLIOT OPPENHEIM AND  
LESLIE ZOELLER:

FRANSCCELL, STRICKLAND, ROBERTS &  
LAWRENCE  
BY: SCOTT D. MACLATCHIE  
225 South Lake Avenue  
Penthouse  
Pasadena, California 91101-3005

FOR DEFENDANTS DAVID CONN AND CAROL  
NAJERA:

KEVIN C. BRAZILE  
Principal Deputy County Counsel  
650 Kenneth Hahn Hall of Administration  
500 West Temple Street  
Los Angeles, California 90012  
ALSO PRESENT: LESLIE ZOELLER

\* \* \*

[p. 5] your right is going to be taking down everything you say. She will type it into a booklet.

You will then have an opportunity to review the contents of your testimony. You will have an opportunity to make any changes that you see fit to your testimony. However, should you make such changes, counsel will have an opportunity to comment on those changes at the time of trial.

Have you taken any medication today?

A No.

Q And are you generally under a course of medication?

A I think I took a Lasix pill this morning.

Q And what is that for?

A For - it helps urination.

Q What I would like to do - and I will try to speed this up as much as possible so we can get all of us out of your house as soon as possible this afternoon. But I would like to get a little bit of background information.

Can you tell me when you were born?

A January 15, 1912.

Q And when did you go to law school?

A 1937 - wait a minute. In 1932 to 1937.

Q Where did you go to law school?

[p. 6] A Where?

Q Yes.

A Southwestern University.

Q I didn't realize Southwestern was that old. And I take it you had obtained a J.D. Degree at that time?

A Yes.

Q And have you practiced law in Los Angeles since 1937?

A Yes.

Q And can you tell me what the nature of your practice has been over the years?

A General practice. However, specifically, I've been known to have good knowledge of geology and civil engineering. So I've had quite a few of those cases.

Q And when you graduated law school in 1937, did you go work with a firm, or were you in solo practice?

A Solo.

Q And were you in solo practice your entire career?

A Yes.

Q When did you stop active practice?

A About six months ago.

Q What is your current Bar status?

[p. 7] A Inactive.

Q And when did you go inactive?

A About six months ago.

Q Did you ever handle any criminal cases in your practice?

A Oh, a couple when I first started to practice, misdemeanors.

Q And that would have been in the 30's and 40's?

A I think about 1938, '39.

Q So would it be fair to say in the last 20 years, you have not had any criminal practice?

A True.

Q Have you ever been investigated by the State Bar?

A No.

Q Have you ever had a complaint filed against you by the State Bar?

A No.

Q When did you first become a special master?

A It's hard for me to remember. I assume maybe 10 years ago or 8 years ago. I really don't have a clear memory of when.

Q And how did that come about?

A I don't know how to answer that.

\* \* \*



[p. 66]

State of California        )  
                                       ) SS:  
 County of Los Angeles    )

I, Joanne Hokyo, Certified Shorthand Reporter No. 9169, in and for the State of California, do hereby certify:

That prior to being examined, ELLIOT OPPENHEIM, the witness named in the foregoing deposition, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth;

That said deposition was taken before me pursuant to Notice, at the time and place therein set forth, and was taken down be [sic] me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

I further certify that I am neither counsel for, nor related to, any party to said action, nor in anywise interested in the outcome thereof.

In witness whereof, I have hereunto subscribed my name this 11th day of July, 1995.

/s/ Joanne Hokyo  
 Certified Shorthand Reporter  
 For the State of California

**EXHIBIT 7**

**UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA**

PAUL L. GABBERT,	)	
Plaintiff,	)	
	)	
vs.	)	No. CV 94
DAVID CONN, CAROL NAJERA,	)	4227 RSWL(Ex)
ELLIOT OPPENHEIM, LESLIE	)	
ZOELLER	)	
AND DOES 1 THROUGH X,	)	
Defendants.	)	
_____	)	

**DEPOSITION OF PATTIJO FAIRBANKS**

**Los Angeles, California  
 August 10, 1995**

**UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA**

PAUL L. GABBERT,	)	
Plaintiff,	)	
	)	
vs.	)	No. CV 94
DAVID CONN, CAROL NAJERA,	)	4227 RSWL(Ex)
ELLIOT OPPENHEIM, LESLIE	)	
ZOELLER	)	
AND DOES 1 THROUGH X,	)	
Defendants.	)	
_____	)	

## DEPOSITOIN OF PATTIJO FAIRBANKS,

taken on behalf of the Plaintiff, at 655 South Hope Street, 13th Floor, Los Angeles, California 90017, commencing at 2:05 P.M., Thursday, August 10, 1995, pursuant to notice, before Jo Ann C. Iwamasa, CSR 7557, RPR.

## APPEARANCES:

## FOR THE PLAINTIFF:

TALCOTT, LIGHTFOOT, VANDEVELDE,  
WOEHRLE & SADOWSKY  
BY: MELISSA N. WIDDIFIELD  
655 South Hope Street, 13th Floor  
Los Angeles, California 90017

## FOR THE DEFENDANTS DAVID CONN AND CAROL NAJERA:

KEVIN C. BRAZILE  
Principal Deputy County Counsel  
650 Kenneth Hahn Hall of Administration  
500 West Temple Street  
Los Angeles, California 90012

## FOR DEFENDANTS ELLIOT OPPENHEIM AND LESLIE OPPENHEIM:

FRANSCCELL, STRICKLAND, ROBERTS, &  
LAWRENCE  
BY: SCOTT D. MAC LATCHIE  
225 South Lake Avenue, Penthouse  
Pasadena, California 91101-3005

\* \* \*

[p. 37] recollection.

Q I take it at some point in time, David Conn was there, Carol Najera was there, Elliot Oppenheim was there, and Detective Zoeller was there?

A Yes.

Q When you got there, did you see Traci Baker?

A I'm sure at some point I did.

Q Did you know who she was?

A I'm sure at some point I did.

Q When you got there, what did you do?

A I don't recall.

Q Do you recall what you did during any period of time that you were there?

A With minor exceptions, no.

Q And what are those minor exceptions?

A I recall knocking on the door and telling Mr. Gabbert that his client wanted to see him.

Q Do you recall her being called to go into the grand jury room to testify?

A Not specifically.

Q You saw Elliot Oppenheim serve a search warrant on Paul Gabbert, did you not?

MR. BRAZILE: Objection. Assumes facts not in evidence. Lack of foundation.

[p. 38] Don't guess. Don't speculate. If you saw it, tell her. If you didn't, let her know that.

THE WITNESS: Not specifically.



BY MS. WIDDIFIELD:

Q When you say "not specifically," do you recall generally?

A No.

Q Do you recall, at any time, Detective Zoeller and Elliot Oppenheim being in front of Mr. Gabbert and saying, "We have a search warrant"?

A No.

Q Do you recall Mr. Oppenheim going in a room with Mr. Gabbert?

A No.

Q Did you see Mr. Zoeller look through the belongings of Mr. Gabbert?

A No.

Q Did you see Traci Baker go into the grand jury room?

A I don't know.

Q Was she coming out of the grand jury room when you knocked on the door to Mr. Gabbert?

A No. She had already come out.

Q Mr. Gabbert was in a separate room?

A Yes.

[p. 39] Q And do you know who he was with?

A Mr. Oppenheim.

Q Mr. Oppenheim was, pursuant to his duties as a special master, searching Mr. Gabbert at that time. Isn't that right?

MR. MAC LATCHIE: Objection. Speculation.

MR. BRAZILE: Objection. Calls for speculation. Lack of foundation.

If you saw that happen, you can testify to it, but just because she said you saw it happen doesn't mean you saw it.

Do you understand the difference?

THE WITNESS: Yes.

MR. BRAZILE: All right.

THE WITNESS: What was the question?

BY MS. WIDDIFIELD:

Q Were you aware Mr. Oppenheim was, in performing his duties as a special master, searching Mr. Gabbert in the room that they were in together?

A No.

Q What did you think that they were in the room for?

MR. BRAZILE: Well, objection. Assumes facts not - strike that.

Go ahead and answer.

[p. 40] THE WITNESS: What did I think that they were in the room doing?

BY MS. WIDFIELD:

Q Uh-huh.

MR. BRAZILE: Well, objection. That calls for speculation, but you can answer if you have some idea.

THE WITNESS: No specific idea.

BY MS. WIDFIELD:

Q How was it that you came to knock on the door to get Mr. Gabbert?

A Because Traci Baker was brought out of the grand jury room and they told me she wanted to speak with her attorney.

Q Was she able to speak with her attorney?

A Yes.

Q They had a conversation?

A I don't recall.

Q How do you know she was able to speak with her attorney?

A I put the two of them together.

Q You never saw her speak with him?

A No.

Q When you knocked on the door, what happened?

A I don't recall specifically what happened [p. 41] other than somehow, the door was opened by someone. I informed Mr. Gabbert that his client wanted to talk to him. He came out, and his client was there.

Q Did he say to you, "I can't talk to her right now. I'm being searched"?

A I don't recall exactly the particulars of what happened at that point.

Q Do you recall him saying anything to you?

A Not specifically.

Q Did, at some point, Ms. Baker go back into the grand jury room?

A That I don't specifically recall.

Q Do you have any general recollection?

A No.

Q Do you have any recollection at all of what you did after knocking on the door to get Mr. Gabbert?

A No.

Q How long did you stay in the grand jury room area?

A Probably the whole time.

Q Do you recall ever seeing Ms. Baker come out of the grand jury area again?

A Not specifically.

Q Do you recall seeing Mr. Gabbert and Mr. Oppenheim coming out of the room that they were in?

\* \* \*



[p. 48]

STATE OF CALIFORNIA       )  
   )  
 COUNTY OF LOS ANGELES    )       ss:

I, JO ANN C. IWAMASA, CSR 7557, RPR, do hereby  
 certify:

That the foregoing deposition of PATTIJO FAIR-  
 BANKS was taken before me pursuant to notice at the  
 time and place therein set forth, at which time the witness  
 was put under oath by me;

That the testimony of the witness and all objections  
 made at the time of the examination were recorded steno-  
 graphically by me and were thereafter transcribed:

That the foregoing deposition is a true record of the  
 testimony and all objections made at the time of the  
 examination.

IN WITNESS WHEREOF, I have subscribed my name  
 on this 15th day of August, 1995.

/s/ JoAnn C. Iwamasa

## EXHIBIT 8

UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA

Paul L. Gabbert,	)	
Plaintiff,	)	
	)	
v.	)	CV 94-4227-
David Conn, Carol Najera,	)	RSWL (Ex)
Elliot Oppenheim, Leslie	)	<b>ORDER</b>
Zoeller and Does 1 through	)	(Filed
through [sic] X	)	Sep. 30, 1994)
Defendants.	)	
_____	)	

Two of the defendants in the above captioned action,  
 David Conn and Carol Najera, have moved to dismiss  
 Plaintiff Paul L. Gabbert's 42 U.S.C. § 1983 suit. Defen-  
 dants Conn and Najera base their Fed. R. Civ. P. 12(b)(6)  
 motion to dismiss on, alternatively: absolute immunity;  
 qualified immunity; and lack of causation. The matter  
 was set for oral argument on September 19, 1994, but was  
 removed from the Court's law and motions calendar pur-  
 suant to Fed. R. Civ. P. 78, for disposition based on the  
 papers filed.

Now, having carefully considered all of the papers  
 filed in support of and in opposition to the motion, the  
 Court hereby GRANTS in part and DENIES in part  
 Defendants' Motion to Dismiss.

## I. BACKGROUND

Plaintiff Gabbert is counsel for Tracy Baker, a witness in the recent Menendez brothers murder trial. In March of 1994, Baker was being investigated by the Los Angeles District Attorney's office for perjury during the Menendez trial. Baker was called to testify before a grand jury on this issue.

At the Beverly Hills courthouse on March 21, 1994, as Plaintiff escorted his client to the grand jury hearing, Plaintiff was served with a search warrant by Detective Leslie Zoeller.<sup>1</sup> While Baker testified before the grand jury, Plaintiff's person, briefcase, and accordion file were searched by Special Master Elliot Oppenheim.<sup>2</sup> Immediately after Oppenheim's search of Plaintiff, Plaintiff was searched again by Detective Zoeller. District attorneys David Conn and Carol Najera, the moving parties in this motion, were present during this second search of Plaintiff.

Plaintiff alleges that the search warrant was obtained illegally, that the material searched was protected by the attorney-client privilege, and that the search went beyond the scope of the warrant. Plaintiff has filed suit under 42

<sup>1</sup> Leslie Zoeller is another defendant in this action but is not a party to this motion to dismiss.

<sup>2</sup> Oppenheim conducted the first search as a "special master" pursuant to Cal. Penal Code § 1524 (c) (1) which requires the appointment of a special master when a search warrant is issued for documentary evidence in the possession of a lawyer. Oppenheim is another defendant in this action, but is not a party to this motion to dismiss.

U.S.C. § 1983,<sup>3</sup> claiming constitutional violations including the sixth amendment right to counsel, fourth amendment, and substantive due process violations.

## II. DISCUSSION

### A. Standard for Dismissal Under Fed. R. Civ. P. 12(b)(6).

In a Rule 12(b)(6) motion to dismiss, the Court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the non-moving party. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987); *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981). A court need not, however, accept conclusory allegations or unreasonable inferences at face value. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), cert. denied 454 U.S. 1031, 102 S. Ct. 567 (1981). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80

<sup>3</sup> 42 U.S.C. § 1983 provides that

every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.



(1957); see also, *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

In deciding on a Rule 12(b)(6) motion to dismiss, the court generally may not consider material beyond the pleadings. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994). However, material which is properly submitted as part of the complaint may be considered, and documents whose contents are alleged in a complaint, and whose authenticity is not questioned may also be considered, even if the material is not physically attached to the complaint. *Id.* at 454.

**B. Defendants Conn and Najera's First Ground For Dismissal: Absolute Immunity as Prosecutors.**

Defendants first move that Plaintiff's § 1983 suit be dismissed against them on the grounds that, as prosecutors, they have absolute immunity from suit under § 1983.

The government official seeking absolute immunity bears the burden of showing that such immunity is justified for the action at issue. *Burns v. Reed* \_\_\_ U.S. \_\_\_, 111 S. Ct. 1934, 1939 (1991). There is a presumption that qualified rather than absolute immunity is generally sufficient to protect government officials. *Id.* Absolute immunity is given sparingly. *Id.*

Prosecutors are entitled to absolute immunity from suit under § 1983 for conduct "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 411, 431, 96 S. Ct. 984, 995 (1976). In determining a prosecutor's immunity, the court looks at

the function performed by the prosecutor, rather than the prosecutor's status as prosecutor.

Prosecutorial activities in initiating and pursuing prosecution are "functions to which the reasons for absolute immunity apply with full force," and prosecutors are entitled to absolute immunity when performing those functions. *Id.* However, prosecutors are not protected by absolute immunity when they act as police investigators rather than as advocates preparing for trial. *Buckley v. Fitzsimmons*, \_\_\_ U.S. \_\_\_, 113 S. Ct. 2606, 2616 (1993). In other words, when a prosecutor performs functions generally performed by detectives or police officers, he receives the immunity usually accorded those actions - i.e., qualified, not absolute immunity.

In order for Defendants to prevail on their claim for absolute immunity, they must show that they were functioning as advocates rather than as investigators. The *Buckley* Court found that a prosecutor cannot be acting as an advocate unless, as a threshold question, he has probable cause to initiate judicial proceedings. Even after a determination of probable cause, the prosecutor who engages in police investigative work receives only qualified immunity. 113 S. Ct. at 2616 & n.5. The question is not whether the conduct is related to the decision of whether to prosecute, but "whether the prosecutor's actions are closely associated with the judicial process." *Burns*, 111 S. Ct. at 1944.

Plaintiff argues that Defendants acted as police investigators, rather than advocates, because the "single purpose of the defendants' conduct was to gather evidence." Opp. at 12. Defendants' purpose, however, is not the

issue here, in that it is possible for prosecutors to be granted absolute immunity for investigative functions which are connected to their role as advocates. *Imbler*, 424 U.S. at 432, 96 S. Ct. at 995 n.33 (noting that the prosecutor's role as advocate involves conduct preliminary to the initiation of prosecution, including other actions outside the courtroom).

Rather, the issue is Defendants' function during those investigations. Preparation for actions undertaken as an advocate may require investigative and administrative conduct which is shielded as connected to the prosecutor's role as advocate. *Id.* As the Supreme Court has stated, "Drawing a proper line between these functions may present difficult questions." *Id.* Similarly, Plaintiff's assertion that Defendants were engaging in "quintessentially investigative conduct" begs the question of what role Defendants acted in while they were engaging in that conduct.

Plaintiff alleges that Defendants' *Conn* and *Najera* delayed Plaintiff at the courthouse under the pretext of supplying Plaintiff with a letter granting his client immunity, until Plaintiff was served with the search warrant. Plaintiff further alleges that *Conn* and *Najera* were present when Plaintiff was served with the search warrant, and that *Conn* introduced Plaintiff to Special Master Oppenheim, who conducted the first search. Lastly, Plaintiff alleges that *Conn* and *Najera* were present for the second search and viewed Plaintiff's documents during the search, after *Conn* informed Plaintiff that Special Master Oppenheim had determined nothing in the briefcase and files was privileged.

Taking all of the above allegations as true, and making all inferences in favor of the non-moving party as is required on a 12(b)(6) motion, the Court finds that the conduct of Defendants *Conn* and *Najera* constitutes participation in the investigations. Further, the Court finds that these investigations were not connected to Defendants' role as advocates, but, rather, were pre-indictment evidence-gathering more associated with police functions. For those reasons, the Court DENIES Defendants *Conn* and *Najera*'s claim to absolute immunity.

### C. Defendants' Second Claim: Qualified Immunity as Government Officials.

Alternatively, Defendants *Conn* and *Najera* move for dismissal of Plaintiff's § 1983 action on the basis of their qualified immunity as government officials. Qualified immunity shields government officials from suit for damages when they perform discretionary functions, and their conduct does not violate clearly established statutory or constitutional rights of which a reasonable official would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). The Ninth Circuit has set out a three prong inquiry for determining qualified immunity: identification of the specific right allegedly violated; determining whether it was so "clearly established" as to alert reasonable officers; and determining the ultimate issue of whether a reasonable officer could have believed the particular conduct was lawful. *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991). Because this immunity is an immunity from suit, rather than merely a defense to liability, the Supreme Court has stressed the



importance of resolving immunity questions as early as possible in litigation. *Hunter v. Bryant*, \_\_\_ U.S. \_\_\_, 112 S. Ct. 534 (1991).

### 1. Plaintiff's Conduct was Discretionary.

In general, only discretionary conduct by government officials is entitled to qualified immunity. *Harlow*, 457 U.S. at 816, 102 S. Ct. at 2737. Plaintiff contends that Defendants are not entitled to qualified immunity because their conduct in searching him was not discretionary. He contends that the Defendants' alleged supervision and participation in the search of Plaintiff was conduct governed by Cal. Penal Code § 1524(c)(2), which provides for special procedures when a search warrant is issued for documentary evidence in possession of an attorney. Plaintiff argues that, because Cal. Penal Code § 1524 is mandatory, Defendants' conduct was ministerial rather than discretionary and thus outside the scope of behavior protected by qualified immunity.

In order for Plaintiff to state a claim under 42 U.S.C. § 1983, Plaintiff must plead a violation of constitutional or federal law. Plaintiff contends this alleged violation of the state statute resulted in the deprivation of his constitutional rights. However, Plaintiff does not specify the constitutional deprivations to which the alleged violation of Cal. Penal Code § 1524 gives rise.

State law cannot be the basis for a § 1983 claim, unless the violation of the state law also results in a constitutional or federal law violation. *Long v. Norris*, 929 F.2d 1111, 1115 (6th Cir. 1991) (noting that "although

Tennessee prison regulations may create a constitutional entitlement under the due process clause of the fourteenth amendment, they cannot change the standard of analysis for constitutional issues arising under the fourth amendment"). Thus, Plaintiff's argument that Defendants have no qualified immunity on the grounds that they acted ministerially does not succeed, because he fails to state a § 1983 claim on that basis.

The Court finds that Defendants' conduct was discretionary.

### 2. Whether Defendants Violated Clearly Established Law.

The real issue in determining whether Defendants should be entitled to qualified immunity is whether the law governing their conduct was clearly established so that a reasonable officer would have known the conduct was unlawful. *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738. The threshold determination of whether the governing law was clearly established is a matter of law for the court to decide. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993) (citing *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738). However, where material issues of fact are in dispute, the case must proceed to trial. *Id.*, at 873.

#### a. Whether Defendants Were the Cause of the Alleged Deprivations.

Plaintiff alleges numerous constitutional violations. The first issue to be determined, however, is whether Defendants were sufficiently involved in the alleged

unconstitutional conduct to be liable under § 1983. Essentially, Plaintiff alleges that Defendants proximately caused the alleged constitutional violations in two ways: a) they directed or supervised others in the unconstitutional behavior; and b) they directly participated in the second search.

**i. Vicarious Liability Not a Basis for a § 1983 Claim**

Vicarious liability is not a basis for a § 1983 claim. *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658, 692, 98 S. Ct. 2018, 2036-37 (1978). However, supervision or direct participation in the unlawful conduct is a basis for liability under § 1983. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

**ii. Causation Must Be Proximate.**

Section 1983 further requires that a defendant's supervision or participation in the allegedly unconstitutional conduct must be the proximate cause of the deprivation. *Arnold v. Intern. Business Machines*, 637 F.2d 1350, 1355 (9th Cir. 1981).

Defendants contend that Plaintiff has failed to allege any direct participation or supervision on the part of Defendants Conn and Najera. They further contend that Plaintiff fails to show that any supervision or participation by Defendants caused the alleged deprivation of Plaintiff's constitutional rights.

Plaintiff's complaint alleges that Conn directed the search of Plaintiff at the courthouse on March 21, 1994 by

Special Master Oppenheim, as well as the search by Detective Zoeller, and states that Najera and Conn were not only present at the search but also "viewed," documents which were searched. It seems clear that Plaintiff's allegations, taken as true, do state facts showing direction and participation by Defendants. Moreover, it is apparent that such direction and participation would be considered a proximate cause of the constitutional deprivations which Plaintiff alleges. Defendants' lack of causation defense thus fails.

**b. Alleged Constitutional Violations.**

Plaintiff alleges a number of constitutional deprivations caused by Defendants, including substantive due process, fourth amendment, sixth amendment, and fourteenth amendment deprivations.

**i. Fourth Amendment Violations.**

**a. Invalid warrant.**

Plaintiff alleges that Defendants Conn and Najera deprived him of his fourth amendment right, as incorporated through the fourteenth amendment, to be secure from unreasonable searches by conducting a search under an invalid warrant. The warrant is invalid, Plaintiff alleges, because it contains two material misstatements of fact made with the knowledge they were false. Under *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684-85 (1978), allegations of deliberate misstatements made by the affiant to a warrant entitle the defendant to an evidentiary hearing on the validity of the warrant. The



*Franks* standard also defines the scope of qualified immunity in civil rights actions. *Branch v. Tunnell*, 937 F.2d 1382, 1387 (9th Cir. 1991) (*Branch I*). (citing *Rivera v. United States*, 928 F.2d 592, 604 (2d Cir. 1991)). However, Plaintiff does not allege that the actual affiant, Detective Zoeller, made the statements with the knowledge of their falsity, or with reckless disregard of the truth, as *Franks* requires. 438 U.S. at 171, 98 S. Ct. at 2684.

Additionally, Defendants respond that, even if the false statements were made intentionally or in reckless disregard of the truth, there is sufficient other material in the affidavit to support a finding of probable cause, which under *Franks* excuses the inaccuracies. *Id.* at 171-72, 98 S. Ct. at 2684. Defendants point to the affidavit as containing a statement from Plaintiff's client that the primary object of the search warrant, the alleged letter, had been turned over to Plaintiff.<sup>4</sup> The affidavit states that Tracy Baker, Plaintiff's client, had informed the affiant that she had turned over the Menendez correspondence to her attorney, Plaintiff. This statement would be enough to support the issuing of the search warrant against Plaintiff Gabbert, even without the allegedly false statements.

Thus, the warrant is valid under either of Plaintiff's arguments, and the search conducted pursuant to it is likewise valid. The search was not clearly unlawful on the

<sup>4</sup> The affidavit and search warrant were attached to Plaintiff's complaint. Material such as subpoenas and search warrants attached as exhibits to plaintiff's complaint may properly be considered on a motion to dismiss. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) (*Branch II*).

grounds of an invalid warrant, and under *Harlow*, Conn and Najera are entitled to qualified immunity on the charge that the search under the allegedly invalid warrant violated Plaintiff's fourth amendment rights.

**b. Impermissibly Broad Execution of Warrant.**

Secondly, Plaintiff alleges that Oppenheim's, first search violated the fourth amendment because the search went beyond the scope of the warrant.<sup>5</sup> He further alleges that the second search was invalid because it was "repetitive."

The warrant authorized a search of Plaintiff for "any and all correspondence between Tracy Baker and Lyle Menendez." (Complaint, Ex. C.). Plaintiff alleges that Oppenheim's search of Plaintiff's eyeglass case, memorandum calendar, and wallet/pocketbook went beyond the scope of the warrant because such correspondence would not reasonably be expected to be within those objects.

Police may search all items which legitimately might contain the objects specified in the warrant. *United States v. Grandstaff*, 813 F.2d 1353, 1358 (9th Cir. 1987); *United States v. Disla*, 805 F.2d 1340, 1347 (9th Cir. 1986). The warrant in question was for "correspondence." By definition, correspondence may include letters and notes on

<sup>5</sup> The following discussion of Oppenheim's search assumes, without determining, that Defendants Conn and Najera directed that search and thus were a cause of the alleged constitutional deprivation.

small pieces of paper. Such small pieces of paper might have been placed within Plaintiff's eyeglass case, wallet, or calendar. The search of Plaintiff therefore did not go beyond the scope of the warrant and thus was not a violation of the fourth amendment on those grounds. On these grounds, Plaintiff cannot show that the search was clearly unlawful so as to overcome Defendants' claim to qualified immunity under *Harlow*.

Plaintiff further alleges that the second search of his personal effects was unauthorized by the warrant because it was "repetitive" and thus violated his rights under the fourth amendment. Plaintiff cites no case law to support his proposition that such searches are unreasonable. On the contrary, courts have allowed "second" searches under the same warrant, as long as the subsequent search could be considered a continuation of the first search. *United States v. Kaplan*, 895 F.2d 618, 623 (9th Cir. 1990) (holding that officer who visited defendant's offices to obtain specific files was allowed to return several hours later; second entry was considered continuation of the search); *United States v. Carter*, 854 F.2d 1102, 1107 (8th Cir. 1988) (officer's return to a motel room, several hours after a search, was valid because the authority of the search warrant had not expired).

The second search conducted by Zoeller on Plaintiff occurred soon after the first search conducted by Oppenheim, and thus would be considered a continuation of Oppenheim's search under *Kaplan*. In any event, the second search was not clearly unlawful so that a reasonable officer should have known it was illegal. The second search, like the first search, therefore does not meet the *Harlow* test for overcoming qualified immunity.

c. Violation of Cal. Penal Code § 1524

Plaintiff alleges that the search was unconstitutional on a third ground, because it was allegedly conducted in violation of Cal. Penal Code § 1524, as discussed above in section II.C.1. Again, a § 1983 claim must be premised on the violation of federal law or constitutional provision. *Long v. Norris*, 929 F.2d at 1114. The violation of Cal. Penal Code § 1524 in and of itself does not constitute a fourth amendment violation, nor does Plaintiff clearly allege that his substantive due process rights were violated by the alleged violation of the state statute. Officials sued for constitutional violations do not lose their qualified immunity in § 1983 actions merely because their conduct violates some state statutory or administrative provision. *Davis v. Scherer*, 468 U.S. 183, 194, 104 S. Ct. 3012, 3019 & n.12 (1984). The violating conduct must violate clearly established federal law. *Elder v. Holloway*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1019, 1023 (1994) (unanimous decision),

Even if Plaintiff alleged that Defendants' failure to follow the procedural requirements of Cal. Penal Code § 1524 constituted a fourteenth amendment deprivation, his claim would fail. While state law may create a property interest protected by the fourteenth amendment, a substantive property right cannot exist exclusively by virtue of a procedural right. *Dorr v. County of Butte*, 795 F.2d 875, 876, 877 (9th Cir. 1986).



ii. Intrusion into Client Relationships  
as a Sixth Amendment Violation

Plaintiff alleges that Defendants, by causing the search warrant to be served upon him and participating in the search, rendered him incommunicado from his client who was simultaneously testifying before the grand jury, thereby violating his client's sixth amendment right to effective counsel.

a. Plaintiff's Standing to Raise His  
Client's Sixth Amendment  
Claim

Plaintiff has standing to assert his client Baker's sixth amendment claim<sup>6</sup> under *Wounded Knee Legal Defense/Offense Com. v. FBI*, 507 F.2d 1281, 1284 (8th Cir. 1974) ("[A] lawyer has standing to challenge any act which interferes with his professional obligation to his client and thereby, through the lawyer, invades the client's constitutional right to counsel."); *Keker v. Procunier*, 398 F. Supp. 756, 765 (E.D. Cal. 1975) (counsel forced to meet their imprisoned clients in poor conditions had standing to raise their clients' sixth amendment claims).

<sup>6</sup> The record does not state whether or not Baker is actually a defendant in a criminal proceeding, although it appears that she was the object of a grand jury investigation. A violation of the attorney-client privilege implicates the sixth amendment only when it applies to the relationship between a criminal defendant and his attorney. *Partington v. Gedan*, 961 F.2d 852, 863 (9th Cir. 1992).

b. Interference with Attorney-Client Relationship and Prevention of Effective Counsel as a Sixth Amendment Violation

The question here is whether, for purposes of the *Harlow* test for qualified immunity, the law governing Defendants' behavior in searching Plaintiff and arguably interfering with his client's sixth amendment right to counsel was clearly established.

Plaintiff alleges that the serving of the search warrant upon him just as his client was called to testify in front of the grand jury was an interference with his client's sixth amendment right to effective assistance of counsel. Because of the serving of the search warrant and Oppenheim's subsequent search of Plaintiff, Plaintiff claims that his client was prevented from consulting with him immediately before and during her grand jury testimony. Plaintiff argues that this constitutes a violation of the Sixth Amendment.

Leaving aside the causation question of whether Defendants Conn and Najera were actually involved in timing the service of the search warrant to interfere with Plaintiff's representation of his client, the issue is whether such alleged interference is a violation of Baker's sixth amendment right to effective counsel. Governmental interference with the attorney-client relationship will constitute a violation of the sixth amendment only if the interference substantially prejudices the defendant. *United States v. Irwin*, 612 F.2d 1182, 1186-1187 (9th Cir. 1980); see *United States v. Glover*, 596 F.2d 857, 863-64 (9th Cir. 1979). Plaintiff makes no allegation that his client was

substantially prejudiced by his unavailability. For that reason, the law is not clearly established that Defendants' alleged interference<sup>7</sup> with Plaintiff's representation of his client was unlawful. Under *Harlow* Defendants Conn and Najera are thus entitled to qualified immunity on this issue.

c. Defendant's Contact of Plaintiff's Client as a Violation of Sixth Amendment

Plaintiff further alleges that Defendants Conn and Najera violated his client's sixth amendment rights by questioning her during a search of her home on March 18, 1994, despite knowing that she was represented by counsel, in violation of Cal. Prof. R. conduct 2-100 (West Supp. 1994). Cal. Prof. R. Conduct 2-100 (A) provides that

While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

This rule has been found to apply to prosecutors pursuing a criminal case. *United States v. Lopez*, 4 F.3d 1455, 1459 (9th Cir. 1993). However, while Defendants Conn and Najera are bound by this rule and allegedly may have violated it, Plaintiff does not allege that this violation "substantially prejudiced" his client so that, under

<sup>7</sup> Again, the Court assumes without determining that causation exists, even though Defendants Conn and Najera's causation of the alleged interference is far from clear.

*United States v. Irwin*, his client's sixth amendment rights have been violated. Further, as discussed above, violations of state law do not provide a claim under § 1983 unless the violations in some way implicate a violation of constitutional rights.

d. Invasion of Attorney-Client Privilege.

Plaintiff alleges that the search of his briefcase and files invaded the attorney-client privilege because privileged documents were viewed during the searches, and that his clients' sixth amendment rights were violated as a result. Plaintiff's allegations again fail to state a clearly established constitutional violation.<sup>8</sup> "[S]tanding alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right." *Partington v. Gedan*, 961 F.2d 852, 863 (9th Cir. 1992)(quoting *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985)). Unless the interference with the attorney-client privilege substantially prejudices the defendant, an intrusion on the confidential relationship between a defendant and his attorney does not constitute a sixth amendment violation. *Partington*, 961 F.2d at 863; *Clutchette*, 770 F.2d at 1471 (citing *United States v. Irwin*).

<sup>8</sup> Plaintiff alleges that not only Baker's files but other clients' files were viewed during this search. Plaintiff's clients whose files were viewed may have a privacy interest in the files, but Plaintiff does not have standing to raise his clients' fourth amendment claims. *DeMassa v. Nunez*, 770 F.2d 1505, 1506, 1507 (9th Cir. 1985).



Thus, case law does not establish that Defendants' conduct was clearly a violation of the sixth amendment. Again, Plaintiff fails to allege that his client was substantially prejudiced by Defendant's alleged interference with the attorney-client privilege. Thus, under *Harlow*, Defendants have a qualified immunity to Plaintiff's claim.

iii. Plaintiff's Fourteenth Amendment Right to Practice His Profession

Plaintiff alleges that Defendants' conduct interfered with his fourteenth amendment interest in practicing his profession. Such a right has been found to exist. *Keker v. Procunier*, 398 at 756; see *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972). At least one district court has found that prison officials impermissibly interfered with attorneys' fourteenth amendment rights when attorneys were forced to meet their clients in an overly warm interview room in which glass partitions hampered attorneys' ability to consult with their clients. *Kecker*, 398 F. Supp. at 761.

To show that a right allegedly violated is "clearly established by law" under the *Harlow* test,

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

*Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 3039 (1987) (citations omitted).

Defendants' alleged plan to serve the search warrant upon Plaintiff as his client began testifying before the grand jury is arguably an interference with Plaintiff's fourteenth amendment right to practice his profession. Plaintiff contends that as a result of the serving of the search warrant and the subsequent search, he was prevented from advising his client immediately before and during the grand jury hearing, when his client specifically twice sought to consult with him. Additionally, when Plaintiff stated that his client's appearance needed to be delayed during his search, his client was instead ordered to immediately appear in front of the grand jury.

Viewing the evidence most favorably for Plaintiff on this motion to dismiss the court finds that Defendants did violate Plaintiff's clearly established fourteenth amendment to practice his profession free from undue governmental interference. The Court thus DENIES Plaintiff's motion to dismiss this claim.

c. Substantive Due Process "Shocks the Conscience" Claim.

Lastly, Plaintiff claims that Defendants' conduct is so egregious that it "shocks the conscience" and violates substantive due process notions of decency and fairness. This "shock the conscience" test was first expressed in *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209 (1952), where police officers in search of evidence forcibly pumped the stomach of a criminal suspect. This type of

substantive due process claim has most often been invoked in relation to police brutality and unwanted body manipulation, but has also been applied to relentless questioning of a suspect. *Cooper v. Dupnik*, 963 F.2d 1220, 1249, 1250 (9th Cir. 1992).

The Supreme Court has not set out specific standards for the test. *Id.* The Court finds here that Defendants' alleged conduct was not so lacking in decency and fairness that their actions violated Plaintiff's substantive due process right. Thus, Defendants have qualified immunity for Plaintiff's substantive due process claim.

#### **D. Qualified Immunity No Defense to Injunctive Relief**

Qualified immunity is not a defense to a claim for injunctive relief. *American Fire v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991). Plaintiff petitions for both damages and injunctive relief. As discussed above, Plaintiff's claim for damages should be dismissed on the grounds that Defendants have qualified immunity which protects them from civil suits for damages, but Plaintiff's claim for injunctive relief is more appropriately considered on a motion for summary adjudication.

#### **E. Leave to Amend Complaint**

Fed. R. Civ. P. 15(a) states that leave to amend pleadings "shall be freely given when justice so requires." However, leave may be denied when amendment would cause undue delay, would be made in bad faith, would be futile, or would cause prejudice to the opposing party.

*Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973). Leave to amend need not be granted if the court determines that allegation of other facts consistent with the challenged pleading could not correct the deficiency. *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988); *Schreiber Dist. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

In this case, the Court determines that it would be futile to grant Plaintiff leave to amend his pleadings in regard to his First Claim for damages, which alleges fourth amendment violations, and his Second Claim for damages, subsections (c) (alleged violation of fourth and fourteenth amendments based on Cal. Penal Code § 1524) (e) (alleged violation of sixth and fourteenth amendment based on Cal. R. Prof. Conduct 2-100), and (f) (alleged violation of attorney-client privilege). The Court thus dismisses those claims without leave to amend.

#### **IV. CONCLUSION**

Defendants Conn and Najera's Rule 12(b)(6) motion to dismiss is hereby **DENIED** as to subsection (d) of Plaintiff's Second Claim for the violation of his fourteenth amendment right to practice his profession, and as to Plaintiff's claims for injunctive and declaratory relief. Defendants' Rule 12(b)(6) motion to dismiss is hereby **GRANTED** on the basis of qualified immunity as to Plaintiff's remaining claims for damages against Defendants Conn and Najera. Plaintiff's claims for fourth amendment violations, violations of the attorney-client privilege, violations of Cal. Rule Prof. Conduct 2-100, and



violations of Cal. Penal Code § 1524 are **DISMISSED  
WITH PREJUDICE.**

**IT IS SO ORDERED.**

RONALD S W LEW  
RONALD S.W. LEW  
United States District Judge

DATED: September 27, 1994

CV 94-4227-RSWL *Gabbert v. Conn, Najera et al.*, Defen-  
dants Conn and Najera' 12(b)(6) motion to dismiss.

(Gabbert1.order/j)

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**EXHIBIT 9**  
**THE GRAND JURY OF THE**  
**COUNTY OF LOS ANGELES**  
**STATE OF CALIFORNIA**

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IN RE GRAND	)	CASE NO.
JURY INVESTIGATION.	)	(NONE)
	)	(SECRET)
	)	
	)	

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REPORTER'S PARTIAL TRANSCRIPT  
OF GRAND JURY PROCEEDINGS

(WITNESS: TRACI LE BAKER)

MONDAY, MARCH 21, 1994

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**APPEARANCES:**

DAVID CONN, CAROL NAJERA, DEPUTIES  
DISTRICT ATTORNEY OF THE COUNTY OF  
LOS ANGELES, REPRESENTING THE OFFICE  
OF THE DISTRICT ATTORNEY.

TERRY L. WHITE, DEPUTY DISTRICT ATTOR-  
NEY OF LOS ANGELES COUNTY AND LOS  
ANGELES COUNTY GRAND JURY ADVISOR.

RICHARD B. COLBY, CSR 1080, DULY  
APPOINTED AND SWORN AS THE OFFICIAL  
STENOGRAPHIC REPORTER OF THE LOS  
ANGELES COUNTY GRAND JURY.

RICHARD B. COLBY, CSR 1080  
OFFICIAL REPORTER

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## EXAMINATION

WITNESS(ES):	EXAMINATION
BAKER, TRACI LEE	25

[p. 1] LOS ANGELES, CALIFORNIA;  
MONDAY, MARCH 21, 1994  
10:20 A.M.

(AT THE BEGINNING OF THESE PROCEEDINGS,  
19 GRAND JURORS WERE PRESENT.)

THE FOREPERSON: THIS HEARING IS NOW  
IN SESSION.

MADAME SECRETARY, WHAT IS THE STATUS OF  
THE ROLL?

(ROLL CALLED.)

THE SECRETARY: LET THE RECORD  
REFLECT THERE ARE NINETEEN GRAND JURORS  
PRESENT THIS MORNING.

THE FOREPERSON: GOOD MORNING, MR.  
COLBY. PLEASE RAISE YOUR RIGHT HAND. I WILL  
NOW SWEAR IN THE COURT REPORTER.

(THE GRAND JURY COURT REPORTER, RICHARD  
B. COLBY, WAS SWORN AS FOLLOWS:)

THE FOREPERSON: YOU DO SOLEMNLY  
SWEAR THAT YOU WILL CORRECTLY TAKE IN  
SHORTHAND AND CORRECTLY TRANSCRIBE, TO  
THE BEST OF YOUR ABILITY, ALL OF THE TESTI-  
MONY GIVEN BY EACH AND EVERY WITNESS TESTI-  
FYING IN THE MATTER NOW PENDING BEFORE THIS  
GRAND JURY, AND THAT YOU WILL KEEP SECRET  
AND DIVULGE [p. 2] TO NO ONE ANY OF THE PRO-  
CEEDINGS OF THIS GRAND JURY, SO HELP YOU GOD.

THE REPORTER: I DO.

THE FOREPERSON: I WILL NOW READ THE  
FOREMAN'S STATEMENT.

(PAGES 3 THROUGH A PORTION OF 24  
ARE NOT INCLUDED PER THE COURT'S  
MINUTE ORDER OF 5-19-5, A COPY  
OF WHICH IS ATTACHED HERETO.)

\* \* \*

[p. 24] MS. NAJERA: MADAME FOREMAN,  
AT THIS TIME WE WOULD LIKE TO CALL TRACI  
BAKER.

THE FOREPERSON: TRACI BAKER?

THE WITNESS: YES.

THE FOREPERSON: PLEASE RAISE YOUR  
RIGHT HAND.

DO YOU SOLEMNLY SWEAR THAT THE EVI-  
DENCE YOU SHALL GIVE IN THIS MATTER NOW  
PENDING BEFORE THE GRAND JURY OF THE  
COUNTS TEA QF LOS ANGELES, SHALL BE THE



TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

THE WITNESS: YES, MA'AM.

THE FOREPERSON: PLEASE BE SEATED.

MISS BAKER, PLEASE STATE AND SPELL YOUR FULL NAME, SPEAKING DIRECTLY INTO THE MICROPHONE.

THE WITNESS: FIRST NAME FIRST?

OKAY.

TRACI, T-R-A-C-I, LE, L-E, BAKER, B-A-K-E-R.

THE FOREPERSON: YOU MAY PROCEED.

[p. 25] MS. NAJERA: THANK YOU.

TRACI LE BAKER,

CALLED AS A WITNESS BEFORE THE LOS ANGELES COUNTY GRAND JURY, WAS DULY SWORN AND TESTIFIED AS FOLLOWS:

#### EXAMINATION

BY MS. NAJERA:

Q. MISS BAKER, ARE YOU ACQUAINTED WITH THE DEFENDANT LYLE MENENDEZ?

A. AT THIS TIME, I WASN'T ABLE TO SPEAK WITH MY ATTORNEY. HE'S STILL WITH THE SPECIAL MASTER.

MAY I ASK PERMISSION TO GO AND CONFER WITH HIM FOR A MOMENT?

THE FOREPERSON: IF THE SERGEANT-AT-ARMS WOULD PLEASE ESCORT MISS BAKER TO THE DOOR SO SHE MAY SPEAK WITH HER ATTORNEY.

(THE WITNESS EXITS THE GRAND JURY HEARING ROOM.)

THE SERGEANT-AT-ARMS: MADAME FOREMAN, IT IS GOING TO BE A FEW MINUTES.

THE FOREPERSON: THANK YOU.

MS. NAJERA: MADAME FOREMAN, MAY WE HAVE PERMISSION TO LEAVE THE GRAND JURY ROOM FOR A MOMENT?

THE FOREPERSON: YES, YOU MAY.

[p. 26] (THE DEPUTIES DISTRICT ATTORNEY EXIT THE GRAND JURY HEARING ROOM.)

(SHORT PAUSE.)

THE FOREPERSON: BACK ON THE RECORD.

MS. NAJERA: WE WOULD RECALL TRACI BAKER.

THE FOREPERSON: THANK YOU.

THE FOREPERSON: MISS BAKER, YOU WILL RECALL THAT YOU HAVE PREVIOUSLY BEEN SWORN AND ARE STILL UNDER OATH.

THE WITNESS: YES.

THE FOREPERSON: YOU MAY PROCEED.

MS. NAJERA: THANK YOU.

Q. MISS BAKER, ARE YOU ACQUAINTED WITH THE DEFENDANT LYLE MENENDEZ?

A. BASED ON THE ADVICE OF MY COUNSEL, I RESPECTFULLY DECLINE TO ANSWER THE QUESTION BECAUSE MY ANSWER MIGHT TEND TO INCRIMINATE ME.

Q. DID YOU KNOW HIM ON AUGUST - DURING AUGUST OF 1989?

A. AGAIN, I HAVE TO GO CONFER WITH COUNSEL.

I APOLOGIZE IF IT'S INCONVENIENT, BUT THIS IS WHAT I HAVE BEEN INSTRUCTED TO DO.

MAY I DO THIS?

THE FOREPERSON: THE SERGEANT-AT-ARMS WILL ESCORT MISS BAKER TO THE DOOR TO COMPLY WITH HER REQUEST TO SPEAK WITH HER COUNSEL.

[p. 27] (THE WITNESS EXITS THE GRAND JURY HEARING ROOM.)

(SHORT PAUSE.)

THE FOREPERSON: MISS BAKER, LET ME REMIND YOU THAT YOU ARE STILL UNDER OATH.

THE WITNESS: THANK YOU.

Q. BY MS. NAJERA: AND THE QUESTION I ASKED YOU WAS:

DID YOU KNOW HIM IN AUGUST OF 1989?

A. AGAIN, BASED ON THE ADVICE OF COUNSEL, I RESPECTFULLY DECLINE TO ANSWER THE QUESTION BECAUSE MY ANSWER MIGHT TEND TO INCRIMINATE ME.

Q. WHEN YOU WERE SERVED WITH A SUBPOENA FOR THIS GRAND JURY PROCEEDING, IT WAS ALSO ORDERED THAT YOU BRING WITH YOU SOME DOCUMENTS RELATING TO YOUR CORRESPONDENCE WITH LYLE MENENDEZ.

DID YOU BRING THESE DOCUMENTS?

A. I'M GOING TO HAVE TO AGAIN CONFER.  
I'M SORRY.

MR. CONN: BEFORE THE WITNESS GETS UP, MADAME FOREMAN, I THINK AT THIS POINT WE MAY NEED THE PRESIDING JUDGE TO DETERMINE WHETHER OR NOT THE ANSWER MAY TEND TO INCRIMINATE THE WITNESS.

I THINK THIS IS A QUESTION THAT WILL CLEARLY NOT INCRIMINATE.

SHE IS UNDER GRAND JURY SUBPOENA TO PRODUCE THE [p. 28] DOCUMENTS.

SHE'S FAILED TO PRODUCE THE DOCUMENTS, AND WE WILL ASK THAT SHE BE HELD IN CONTEMPT OF THIS COURT BY THE PRESIDING JUDGE.

MR. WHITE: MADAME FOREMAN, MAY WE TO A A [sic] 10-MINUTE RECESS, ORDER THE WITNESS BACK IN 10 MINUTES, SO I CAN CONFER WITH THE PRESIDING JUDGE?



THE FOREPERSON: MISS BAKER, YOU ARE EXCUSED AND ORDERED TO RETURN IN 10 MINUTES TO THIS HEARING ROOM WITHOUT FURTHER SUBPOENA, REMINDER OR ORDER.

DO YOU UNDERSTAND?

THE WITNESS: YES.

YOU ARE ADMONISHED NOT TO REVEAL TO ANY OTHER PERSON, EXCEPT AS ORDERED BY THE COURT, WHAT QUESTIONS WERE ASKED OF YOU AND WHAT RESPONSES WERE GIVEN.

IN ADDITION, YOU ARE NOT TO REVEAL ANY OTHER MATTERS CONCERNING THE NATURE OR SUBJECT OF THE INVESTIGATION WHICH YOU LEARNED DURING YOUR APPEARANCE HERE, UNLESS AND UNTIL SUCH TIME AS A TRANSCRIPT OF THESE PROCEEDINGS IS MADE PUBLIC.

I WISH TO ADVISE YOU ALSO THAT A VIOLATION OF THIS ORDER CAN BE THE BASIS OF A CONTEMPT CHARGE AGAINST YOU.

DO YOU UNDERSTAND?

THE WITNESS: YES.

THE FOREPERSON: THANK YOU.

YOU ARE EXCUSED.

THE WITNESS: OKAY.

[p. 29] (THE WITNESS EXITS THE GRAND JURY HEARING ROOM.)

THE FOREPERSON: WE ARE IN RECESS FOR 10 MINUTES.

THE GRAND JURORS ARE ADMONISHED THAT THEY ARE NOT TO FORM OR EXPRESS ANY OPINIONS ABOUT THIS CASE OR DISCUSS IT AMONG THEMSELVES UNTIL THE MATTER COMES BEFORE US FOR DELIBERATION.

WE ARE IN RECESS FOR 10 MINUTES.

(SHORT RECESS TAKEN.)

[p. 30] THE FOREPERSON: THIS HEARING IS NOW IN SESSION.

THE SECRETARY: THE SAME NINETEEN GRAND JURORS PRESENT AT THIS MORNING'S ROLL CALL ARE NOW PRESENT.

THE FOREPERSON: THANK YOU.

YOU MAY PROCEED.

MS. NAJERA: THANK YOU, MADAME FOREMAN.

AT THIS TIME, THE PEOPLE WOULD RECALL TRACI BAKER.

THE SERGEANT-AT-ARMS: EXCUSE ME, MADAME FOREMAN.

HE'S GOING TO NEED A COUPLE MINUTES WITH HER.

(SHORT PAUSE.)

MR. WHITE: LET'S HAVE THE SERGEANT-AT-ARMS TELL HER TO COME IN NOW.

THE FOREPERSON: MISS BAKER, IF YOU WOULD PLEASE RESTATE YOUR NAME FOR THE RECORD.

THE WITNESS: TRACI L. BAKER.

THE FOREPERSON: AND I REMIND YOU THAT YOU ARE STILL UNDER OATH.

THE WITNESS: YES.

THE FOREPERSON: YOU MAY PROCEED.

MR. WHITE: JUST GO TO YOUR STATEMENT.

THE FOREPERSON: MISS BAKER, YOU ARE ORDERED TO GO TO DEPARTMENT 110 OF THE SUPERIOR COURT FOR CONTEMPT PROCEEDINGS REGARDING YOUR FAILURE TO PRODUCE THE DOCUMENTS REQUESTED BY THE GRAND JURY SUBPOENA.

MISS BAKER, I DECLARE YOU TO BE IN CONTEMPT OF [p. 31] THIS GRAND JURY.

THE SHERIFF IS ORDERED TO TRANSPORT YOU FORTHWITH TO DEPARTMENT 110 OF THE SUPERIOR COURT FOR FURTHER PROCEEDINGS REGARDING THIS CONTEMPT.

I FURTHER DIRECT THE GRAND JURY LEGAL ADVISOR, DEPUTIES DISTRICT ATTORNEY AND THE COURT REPORTER TO PROCEED IMMEDIATELY TO

DEPARTMENT 110 FOR FURTHER PROCEEDINGS IN THIS MATTER.

(THE WITNESS EXITS THE GRAND JURY HEARING ROOM.)

THE FOREPERSON: THE GRAND JURY IS NOW IN RECESS IN THIS MATTER.

DO WE NEED TO BE ADMONISHED IN THIS?

MR. WHITE: LET'S GO BACK ON THE RECORD SO SHE CAN DO SOMETHING.

THE FOREPERSON: WE ARE BACK ON THE RECORD OUT OF THE PRESENCE OF THE WITNESS.

MS. NAJERA: THE ONLY TWO DOCUMENTS THAT WE HAVE MARKED FOR PURPOSE OF THIS HEARING, EXHIBITS 1 AND 2, WE WOULD ASK THAT THEY BE PUT IN EVIDENCE RIGHT NOW.

THE FOREPERSON: SO ORDERED.

(RECEIVED IN EVID.: = EXHIBITS 1 & 2.)

THE FOREPERSON: THE GRAND JURORS HAVE BEEN ADMONISHED REGARDING DISCUSSION OF THE CASE.

PLEASE REMEMBER AND FOLLOW THE ADMONITION.

THE GRAND JURY IS NOW IN RECESS IN THIS [p. 32] MATTER.

(RECESS TAKEN.)

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[p. 33] LOS ANGELES, CALIFORNIA;  
 MONDAY, MARCH 21, 1994  
 DEPARTMENT NO. 110  
 HON. FLORENCE MARIE COOPER, JUDGE  
 11:40 A.M.

---

THE COURT: WE ARE ON THE RECORD IN CHAMBERS.

I AM SUBSTITUTING FOR DEPARTMENT 100 ON THE MOTION TO QUASH A GRAND JURY SUBPOENA IN GRAND JURY PROCEEDINGS.

TRACI BAKER IS THE PERSON UNDER INVESTIGATION IN THIS PROPOSED INDICTMENT.

IS THAT CORRECT, MR. WHITE?

MR. WHITE: YES.

IT IS NOT AN INDICTMENT. IT IS JUST AN INVESTIGATORY HEARING. SO THEY WEREN'T SEEKING AN INDICTMENT.

THE COURT: BECAUSE THAT'S PART OF WHAT I NEED TO UNDERSTAND BEFORE I CAN DO MUCH OF ANYTHING WITH THIS.

TELL ME THE DIFFERENCE BETWEEN A PLAIN INVESTIGATORY PROCEEDING AND SOMETHING THAT'S HEADING TOWARD INDICTMENT.

WHAT IS THIS?

MR. WHITE: THE MAIN DIFFERENCE IS JUST AS IT'S STATED.

THE DISTRICT ATTORNEY WILL COME IN AND THEY ARE ONLY INVESTIGATING A POSSIBLE CRIMINAL ACTION, BUT THEY WON'T BE REQUESTING AN INDICTMENT HEARING AT THAT TIME.

IT COULD LATER TURN INTO AN INDICTMENT OR IT COULD JUST BE A PROCEDURE FOR THE DISTRICT ATTORNEY'S [p. 34] OFFICE TO GAIN INFORMATION.

IN THIS PROCEEDING, THEY WERE NOT REQUESTING AN INDICTMENT AT THIS TIME.

THE COURT: BUT IF SOMEONE IS GOING TO BE INDICTED AS A RESULT OF THIS INVESTIGATION, IT'S PROBABLY TRACI BAKER?

MR. WHITE: YES.

THE ALLEGATIONS ARE POSSIBLE PERJURY REGARDING HER TESTIMONY IN THE MENENDEZ TRIAL.

THE COURT: JUST THROUGH THE MEDIA, I THINK I UNDERSTAND WHY THIS INVESTIGATION IS ON GOING.

THERE HAS BEEN AN INDICATION THAT A LETTER WAS WRITTEN BY ERIC OR LYLE -

MR. WHITE: I BELIEVE IT WAS WRITTEN BY LYLE.

THE COURT: - LYLE TO THIS WITNESS INSTRUCTING HER HOW TO TESTIFY.

AND OBVIOUSLY THESE PROCEEDINGS INVOLVE A GRAND JURY SUBPOENA TO MISS BAKER TO PRODUCE ANY CORRESPONDENCE FROM LYLE MENENDEZ.

MR. WHITE: THAT'S CORRECT.

MY CONCERN, CERTAINLY, IS EXPRESSED BY HER ATTORNEY THAT THE PRODUCTION OF ANY SUCH CORRESPONDENCE COULD TEND TO INCRIMINATE HER.

AND IF, IN FACT, SHE'S THE FOCUS OF THIS INVESTIGATION, THERE WOULD APPEAR TO BE SOME MERIT TO THAT.

THE COURT: I WOULD IMAGINE WHAT WE NEED TO DO IS TO PROCEED WITH A CLOSED HEARING IN THIS COURTROOM.

IS MISS BAKER THERE ALONG WITH HER ATTORNEY?

[p. 35] MR. WHITE: MISS BAKER IS HERE.

HER ATTORNEY IS OUTSIDE, BUT HE IS PREPARED TO COME IN IF SHE REQUESTS HIS APPEARANCE, WHICH I BELIEVE SHE WILL.

THE COURT: I BELIEVE THAT'S PRETTY PREDICTABLE.

I THINK THAT'S WHAT WE ARE GOING TO HAVE TO DO, THEN, WE CAN DO IT IN THE COURTROOM. BECAUSE I CAN SIMPLY LOCK THE COURT.

IT'S ALMOST 12:00 O'CLOCK.

MS. NAJERA: IT'S CONVENIENT FOR EVERYBODY TO DO THIS NOW.

THE COURT: I THINK EVERYONE IS HERE.

WHY DON'T WE JUST DO THIS NOW, THEN, AND INSTRUCT RENEE TO LOCK THE COURTROOM.

AND YOU CAN ASK MISS BAKER IF SHE WANTS HER ATTORNEY IN SO WE DON'T LOCK HIM OUT IN THE HALL.

(SHORT PAUSE.)

THE COURT: WE ARE ON THE RECORD TO HEAR PROCEEDINGS IN CONNECTION WITH A MOTION TO QUASH A GRAND JURY SUBPOENA.

FOR THE RECORD, ALTHOUGH WE ARE IN THE COURTROOM, WE ARE NOT IN OPEN COURT IN THAT THE COURT HAS BEEN LOCKED.

IS THAT CORRECT?

THE CLERK: THAT IS CORRECT, YOUR HONOR.

THE COURT: THE PERSONS PRESENT PLEASE STATE YOUR [p. 36] NAMES FOR THE RECORD.

MR. WHITE: TERRY WHITE, DEPUTY DISTRICT ATTORNEY AND ALSO LEGAL ADVISOR FOR THE L.A. COUNTY GRAND JURY.

MR. CONN: DAVID CONN, DEPUTY DISTRICT ATTORNEY.

MR. GABBERT: PAUL GABBERT, G-A-B-B-E-R-T, COUNSEL FOR THE WITNESS TRACI BAKER.



THE COURT: AND MISS BAKER HAS REQUESTED THAT YOU BE PRESENT IN THIS PROCEEDING.

IS THAT CORRECT?

MR. GABBERT: THAT'S CORRECT.

THE COURT: MISS BAKER IS PRESENT AND ONE MORE PERSON PRESENT, GRAND JURY INVESTIGATOR DENNIS DUARTE.

MS. NAJERA: MAY MISS BAKER SIT AT COUNSEL TABLE?

THE COURT: SHE MAY.

ALL RIGHT.

I HAVE BEEN PROVIDED WITH A COPY OF A MOTION TO QUASH A GRAND JURY SUBPOENA AND FEDERAL AUTHORITIES IN SUPPORT OF THAT MOTION.

NEEDLESS TO SAY, I HAVEN'T READ THOSE.

LET ME ASK A COUPLE OF PRELIMINARY QUESTIONS TO SEE IF I UNDERSTAND EXACTLY WHAT THE ISSUE IS.

HAS MISS BAKER BEEN SUBPOENAED TO BOTH TESTIFY AND PRODUCE DOCUMENTS?

MR. CONN: THAT'S CORRECT.

THE COURT: HAS ANY TESTIMONY BEEN TAKEN?

MR. CONN: YOUR HONOR, THE WITNESS TOOK THE STAND THIS MORNING BEFORE THE

GRAND JURY, WE ASKED A COUPLE OF QUESTIONS OF HER AND SHE INVOKED HER FIFTH AMENDMENT [p. 37] PRIVILEGE TO BOTH OF THOSE QUESTIONS.

WE WERE THEN BEGINNING THE PROCESS OF ASKING HER WHETHER SHE HAD PRODUCED THE DOCUMENTS THAT SHE WAS SUBPOENAED TO PRODUCE BEFORE THE GRAND JURY; AND, ONCE AGAIN, SHE WAS INVOKING HER FIFTH AMENDMENT PRIVILEGE AS TO THAT.

SO WE WERE NOT ABLE TO ELICIT FROM HER THE FACT THAT SHE HAS FAILED TO PRODUCE DOCUMENTS.

THE COURT: ALL RIGHT.

ALTHOUGH THERE HAS BEEN A REQUEST TO TESTIFY AND AN INVOCATION OF THE FIFTH AMENDMENT, I DON'T THINK THAT ISSUE IS BEFORE THE COURT.

IT SEEMS TO ME THAT ALL IS AT ISSUE HERE IS THE DEFENDANT'S MOTION TO QUASH THE SUBPOENA WITH RESPECT TO DOCUMENTS AND AS TO WHETHER THERE IS A FIFTH AMENDMENT PRIVILEGE CONCERNING TESTIMONY.

THAT'S DOWN THE LINE, I GUESS, IN LATER LITIGATION.

MISS BAKER HAS BEEN ASKED TO PRODUCE LETTERS OR ANY CORRESPONDENCE THAT SHE HAS RECEIVED FROM LYLE MENENDEZ.

THE MOTION FILED BY THE DEFENSE CONTENDS THAT THE PRODUCTION OF THOSE DOCUMENTS, EVEN IF THE DOCUMENTS WERE NOT WRITTEN BY HER, ARGUABLY, MIGHT NOT BE INCRIMINATING.

THE CONTENTION OF THE DEFENSE IS THAT THE PRODUCTION OF THE DOCUMENTS IS AN INCRIMINATING ACT IN ITSELF AND IT'S PROTECTED BY THE FIFTH AMENDMENT AND THE [p. 38] DEFENDANT WOULD BE ENTITLED TO IMMUNITY BEFORE SHE WOULD BE REQUIRED TO PRODUCE THEM.

SO PERHAPS I SHOULD HEAR FROM THE PEOPLE IN RESPONSE TO THIS.

MR. CONN: THE AUTHORITY THAT WE WERE ABLE TO REFER TO AT THIS POINT IN TIME WAS UNITED STATES VS. DOE, UNITED STATES SUPREME COURT, 1984 CASE AT 104 SUPERIOR COURT 1237.

IT'S MY UNDERSTANDING FROM UNITED STATES VS. DOE THAT THE PRODUCTION OF RECORDS ITSELF IS REQUIRED.

IN THIS CASE INVOLVING A FEDERAL STATUTE CONCERNING USE IMMUNITY, THE SUPREME COURT HELD THAT THAT WITNESS MAY RECEIVE USE IMMUNITY AS TO THOSE DOCUMENTS THEMSELVES, BUT THE CONTENTS OF THE DOCUMENTS WERE NEVERTHELESS ADMISSIBLE AND WERE NOT PRIVILEGED AND HAD TO BE PRODUCED.

SO I THINK THAT THE FIRST ISSUE THAT MAY ARISE IS THE DIFFERENCE BETWEEN THE FEDERAL AUTHORITIES DEALING WITH A FEDERAL USE IMMUNITY STATUTE AND CALIFORNIA, WHICH DOES NOT HAVE A SIMILAR STATUTE.

WERE THIS TO BE ARGUED IN FEDERAL COURT, THE PRACTICAL EFFECT OF THIS, I BELIEVE, WOULD BE THAT THE WITNESS WOULD BE REQUIRED TO PRODUCE THE DOCUMENTS, BUT THAT THOSE DOCUMENTS WOULD NOT BE SOMETHING THAT WE COULD USE AGAINST THIS PARTICULAR WITNESS.

SO SHE WOULD NOT HAVE IMMUNITY FOR THE ENTIRE CRIME, BUT THOSE DOCUMENTS COULD NOT BE USED AGAINST HER IN A CRIMINAL PROCEEDING.

[p. 39] WE THEN TURN TO THE STATE LAW, WHERE WE HAVE NO SUCH USE IMMUNITY BY STATUTE AND WE NEED TO DETERMINE THE DISTINCTION TO BE DRAWN THERE.

MY OPINION, YOUR HONOR, IS, AT MOST, WE WOULD BE GUIDED BY THE SAME STANDARD; THAT IS, AT THE VERY MOST WE COULD NOT USE THOSE DOCUMENTS AGAINST THIS WITNESS IN A CRIMINAL PROCEEDING.

THE QUESTION IS WHETHER THAT STANDARD EVEN APPLIES UNDER THE STATE LAW.

BUT MY POSITION IS THAT, AT LEAST AT THIS POINT, THE WITNESS SHOULD BE ORDERED TO PRODUCE THE DOCUMENTS.



THERE IS A VALID SUBPOENA ORDERING HER TO PRODUCE THE DOCUMENTS, AND THE QUESTION OF WHAT USE CAN BE MADE OF THOSE DOCUMENTS IN THE FUTURE IS SOMETHING THAT THIS COURT OR SOME OTHER COURT CAN DETERMINE AT SUCH TIME THAT THE PEOPLE SEEK TO USE THOSE DOCUMENTS IN AN ACTION AGAINST HER.

THE COURT: I DON'T THINK THAT'S GOING TO PROVIDE MUCH COMFORT TO THE DEFENSE.

LET ME ASK YOU THIS:

ASSUMING THAT IN CALIFORNIA, WHERE WE HAVE TRANSACTIONAL IMMUNITY, ASSUMING THAT THAT APPLIED TO THIS CASE - AND I'M NOT SURE WHETHER THAT WOULD CREATE A DISTINCTION THAT MAKES MUCH DIFFERENCE IN THIS CASE IN TERMS OF THE EFFECT IT WOULD HAVE - ARE THE PEOPLE WILLING TO GRANT THIS WITNESS TRANSACTIONAL IMMUNITY IN EXCHANGE FOR THE PRODUCTION OF THE DOCUMENTS?

[p. 40] MR. CONN: NO, YOUR HONOR, WE ARE NOT.

IN FACT, THERE IS ANOTHER MATTER WHICH IS CLOSELY RELATED TO THE ONE WE ARE DISCUSSING.

IN FACT, IT'S SOMEWHAT INEXTRICABLE FROM THE MATTER WE ARE DISCUSSING, WHICH I SHOULD BRING TO THE COURT'S ATTENTION ALTHOUGH, SPECIFICALLY, I DON'T THINK THE MATTER IS PROBABLY REALLY BEFORE THE COURT.

AND THAT IS THIS:

AFTER I HAD AN OPPORTUNITY TO REVIEW THE AUTHORITIES THIS WEEKEND CONCERNING THIS MATTER - WELL, I SHOULD POINT OUT ON FRIDAY, YOUR HONOR, WE OBTAINED A SEARCH WARRANT TO SEARCH THE WITNESS' HOME.

THE DOCUMENTS THAT WE ARE SEEKING ARE NOT THE DOCUMENTS THAT ARE NORMALLY SUBJECT ONLY TO A GRAND JURY SUBPOENA, SUCH AS THE DOCUMENTS THAT WERE INVOLVED IN UNITED STATES VS. DOE.

WE ARE SEEKING DOCUMENTS WHICH ARE CLEARLY INCRIMINATING OR EVIDENCE OF A CRIME. AND, AS SUCH, THEY ARE SUBJECT TO A SEARCH WARRANT AS WELL AS A GRAND JURY SUBPOENA.

SO LAST FRIDAY WE OBTAINED A SEARCH WARRANT FROM JUDGE POUNDERS AND WE WENT TO THE HOME OF THE WITNESS AND WE SEARCHED HER HOME.

WE DID NOT FIND THE DOCUMENTS.

SHE DID INDICATE DURING THE SEARCH THAT THE DOCUMENTS WERE TURNED OVER TO HER ATTORNEY, MR. GABBERT.

SHE WAS, OF COURSE, STILL ORDERED TO APPEAR BEFORE THE GRAND JURY TODAY AND PRODUCE THOSE DOCUMENTS.

[p. 41] WHAT WE DECIDED TO DO, SINCE THESE WERE DOCUMENTS THAT WERE SUBJECT TO A SEARCH WARRANT, WE DECIDED TO SEEK

ANOTHER SEARCH WARRANT TO RECOVER THE DOCUMENTS FROM COUNSEL.

IT IS OUR POSITION THAT THE MERE FACT THAT SHE HAS TURNED THE DOCUMENTS OVER TO HER COUNSEL DOES NOT CHANGE THE NATURE OF THE DOCUMENTS.

THEY WERE EVIDENCE OF A CRIME BEFORE AND THEY ARE EVIDENCE OF A CRIME NOW.

JUDGE POUNDERS AGREED. AND THIS MORNING JUDGE POUNDERS ISSUED A SEARCH WARRANT FOR THE DOCUMENTS.

NOW, THE ORIGINAL DRAFT OF THE SEARCH WARRANT THAT I HAD DRAFTED THIS MORNING IDENTIFIED THREE LOCATIONS TO BE SEARCHED.

ONE WAS THE LAW OFFICE OF MR. GABBERT, THE SECOND LOCATION WAS HIS PERSON AND BRIEFCASE AND THE THIRD WAS THE PERSON OF TRACI BAKER.

AS THAT WAS BEING PREPARED FOR JUDGE POUNDERS' SIGNATURE, I SAW MR. GABBERT IN THE HALLWAY AND I INQUIRED OF HIM WHETHER HE HAD BROUGHT THE DOCUMENTS WITH HIM.

HE INDICATED TO ME THAT HE HAD, IN FACT, BROUGHT THE DOCUMENTS WITH HIM.

THAT BEING THE CASE, I DECIDED NOT TO MAKE THE SEARCH WARRANTS ANY BROADER THAN NECESSARY, SO I AMENDED THE WARRANTS TO INCLUDE ONLY THE PERSON OF MR. GABBERT AND THE PERSON OF TRACI BAKER.

THAT IS, IN FACT, THE SEARCH WARRANT THAT WE PRESENTED TO JUDGE POUNDERS; AND, ONCE AGAIN, HE SIGNED [p. 42] THAT SEARCH WARRANT TODAY.

FOLLOWING THE ISSUANCE OF THAT SEARCH WARRANT, WE BROUGHT A SPECIAL MASTER AND REQUIRED MR. GABBERT TO OPEN HIS BRIEFCASE AND REVEAL THE CONTENTS OF HIS BRIEFCASE FIRST TO THE SPECIAL MASTER AND THEN TO THE INVESTIGATING OFFICER, WHICH HE DID.

AFTER IT WAS SHOWN AND THE DOCUMENTS WERE STILL NOT PRODUCED, I INQUIRED OF COUNSEL, WAS IT NOT THE CASE THAT HE HAD TOLD ME THIS VERY MORNING THAT HE HAD THE DOCUMENTS THAT WE WERE SEEKING ON HIS PERSON.

HE SUGGESTED THAT IT WAS A MISUNDERSTANDING ON MY PART; THAT HE NEVER CLAIMED THAT THE DOCUMENTS WERE ON HIS PERSON.

AT THIS POINT, WHAT WE DID WAS WE ONCE AGAIN REWROTE THE SEARCH WARRANT, BROUGHT IT TO JUDGE POUNDERS AND IT'S MY UNDERSTANDING THAT JUDGE POUNDERS HAS NOW SIGNED THAT SEARCH WARRANT.

SO THE DOCUMENTS WE ARE SEEKING IS PROPERLY SUBJECT TO SEIZURE PURSUANT TO A SEARCH WARRANT, AND WE INTEND AT THIS TIME TO GO OUT TO COUNSEL'S OFFICE AND SEE THE DOCUMENTS AT HIS OFFICE.

AS I SAID, PROPERLY SPEAKING, THAT IS NOT THE ISSUE BEFORE THE COURT.



THE ISSUE BEFORE THE COURT IS THE CONTEMPT, AND I WOULD ASK THAT THE COURT EITHER FIND HER IN CONTEMPT AT THIS TIME OR THE COURT CAN HOLD THAT RULING IN ABEYANCE UNTIL WE HAVE HAD AN OPPORTUNITY TO GO TO COUNSEL'S OFFICE AND GET THE DOCUMENTS.

[p. 43] AND ONCE WE HAVE THOSE DOCUMENTS IN OUR POSSESSION, WE HAVE NO INTEREST IN HOLDING THIS WITNESS IN CONTEMPT ANY LONGER.

THE COURT: ALL RIGHT.

MR. GABBERT?

MS. NAJERA: SOME, PERHAPS MOST, OF WHAT COUNSEL HAS SAID APPEARS TO BE ACCURATE, ALTHOUGH I DON'T THINK THE DOE CASE IS CONTROLLING.

MOVING BACK A DAY, TO GIVE THE COURT THE PROSPECTIVE OF WHY WE ARE HERE AND WHY WE ARE PURSUING SIMULTANEOUSLY TWO LEGAL AVENUES WHICH MAY OR MAY NOT BE AN ABUSE OF THE GRAND JURY PROCESS:

I MADE ARRANGEMENTS WITH COUNSEL TO HAVE MISS BAKER SERVED IN MY OFFICE ON THE AFTERNOON OF LAST THURSDAY SO SHE COULD RECEIVE THE SUBPOENA TO ATTEND THE GRAND JURY ON MONDAY.

MR. ZOELLER GOT THERE IN THE AFTERNOON AND SERVED HER.

WHEN I LOOKED AT THE SUBPOENA, THE SUBPOENA ASKED HER TO PRODUCE DOCUMENTS - AND I'M PARAPHRASING; I'M NOT READING OFF THE DOCUMENT RIGHT NOW - THAT SAID, "ALL CORRESPONDENCE OR ANY CORRESPONDENCE FROM LYLE MENENDEZ."

ALTHOUGH I ONLY KNOW THIS FROM WHAT I HAVE READ IN THE PAPER, SORT OF, IT APPEARS THAT THERE WAS A LETTER THAT SOMEONE GOT TO DOMINIC DUNN THAT PURPORTS TO BE FROM LYLE MENENDEZ AND IS WRITTEN TO A TRACI.

AND IT DISCUSSES - APPEARS TO DISCUSS PORTIONS OF HER TESTIMONY AT THE PREVIOUS TRIAL.

[p. 44] I WAS PROVIDED WITH A COPY, A POOR PHOTOSTAT OF THAT COPY OF THAT DOCUMENT BY A SOURCE OTHER THAN MY CLIENT, WHICH I PROVIDED TO THE SPECIAL MASTER AND COUNSEL WHEN THE WARRANT WAS EXECUTED TODAY.

WHEN I GOT THE SUBPOENA, I DID SOME RESEARCH.

I CALLED MR. CONN ON THE FOLLOWING MORNING AND I SAID, "I BELIEVE THE ACT OF PRODUCTION IS TESTIMONIAL AND COMPELLED AND PROTECTED BY THE FIFTH AMENDMENT, AND I'M GOING TO BRING A MOTION TO QUASH THE SUBPOENA AS TO THAT PORTION."

AND I SAID, "SHALL WE CONTINUE THE HEARING SO THERE WILL BE TIME FOR THIS?"

AND HE SAID, "NO."

I CALLED HIM BACK AND SAID, "WELL, TO GET THIS HEARD BEFORE MONDAY" - BECAUSE IT WAS NOW FRIDAY - "I NEED AN APPLICATION FOR AN ORDER SHORTENING TIME THAT I WILL BRING INTO DEPARTMENT 100.

"I ASSUME YOU WILL OPPOSE IT," OR ASKED HIM IF HE OPPOSED IT.

AND HE SAID ~~HE~~ OPPOSED IT.

I HAD THE DOCUMENTS PREPARED, WHICH ARE NOW BEFORE YOU AND I SENT THEM DOWN TO DEPARTMENT 100 THAT AFTERNOON. AND, UNBEKNOWNST TO ME, THEY WERE GETTING A SEARCH WARRANT, APPARENTLY.

THERE WAS NOBODY IN DEPARTMENT 100; THEY WOULDN'T FILE THE DOCUMENTS.

I DID A LITTLE SHOPPING OVER THE PHONE, MY MOBILE PHONE, TRYING TO FIND A JUDGE.

[p. 45] I TALKED TO THE CRIMINAL COURT'S COORDINATOR, MR. IVERSON.

HE FOUND ME JUDGE BASCUE.

I HAD MY RUNNER SUBMIT THE APPLICATION, FEDERAL AUTHORITIES AND MOTION BEFORE HIM, ASKING HIM TO SIGN THE ORDER SHORTENING TIME SO THIS MATTER COULD PROCEED IN AN ORDERLY WAY WITH EACH SIDE HAVING AN OPPORTUNITY TO ADDRESS THE ISSUE SO WE WOULDN'T HAVE A CONTEMPT PROCEEDING AND SO THAT - IT DIDN'T DAWN ON ME, I HAVE TO SAY.

IT WAS AN EXAMPLE OF A LACK OF FORESIGHT ON MY PART TO THINK THEY WOULD DO BOTH THINGS SIMULTANEOUSLY.

I THINK IT'S INAPPROPRIATE, BUT I THINK IT'S INAPPROPRIATE TO ARGUE IT BECAUSE I DIDN'T BRIEF IT.

JUDGE BASCUE DENIED THE EX PARTE APPLICATION FOR THE ORDER SHORTENING TIME.

I HAVE A COPY OF WHAT HE DID THAT I CAN PRESENT TO YOU SO YOU CAN SEE HIS REASON.

I PREVIOUSLY SHOWED IT TO COUNSEL THIS MORNING, WHEN COUNSEL MADE THE COMMENT TO THE EFFECT ABOUT BRINGING PAPERS, BECAUSE I HAD A VERY THICK FILE.

I THOUGHT HE WAS REFERRING TO THE MOTIONS AND THE DOCUMENTS THAT I TOLD HIM I WAS BRINGING ON FRIDAY WHICH I COULDN'T GET ANYBODY TO FILE.

NEVER IN MY WILDEST DREAMS DID I THINK HE THOUGHT I WAS BRINGING DOCUMENTS WHICH MAY OR MAY NOT EXIST TO THE GRAND JURY, THEREBY WAIVING THE ATTORNEY-CLIENT PRIVILEGE AND RENDERING MOOT THE FIFTH AMENDMENT OBJECTION.

[p. 46] I SUBMIT TO YOU, ALTHOUGH I DON'T THINK I HAVE HAD THE PLEASURE OF APPEARING BEFORE YOU BEFORE, THAT THAT'S NOT SOMETHING I WOULD DO, BECAUSE IT MAKES NO SENSE.



SO THEY THEN PROCEEDED TO TAKE MY CLIENT INTO THE GRAND JURY, AND I WENT WITH THE SPECIAL MASTER TO BE SEARCHED, WHEREUPON I PRODUCED THE TWO-PAGE COPY OF WHAT PURPORTS TO BE THE LETTER FROM LYLE MENENDEZ TO MISS BAKER.

THEN COUNSEL RELATED THE SUBSEQUENT SEARCH BY MR. ZOELLER AS WELL.

I WAS THEN FACED WITH THE PROBLEM OF HAVING MY CLIENT BE QUESTIONED ABOUT WHETHER SHE HAD PRODUCED DOCUMENTS, WHICH AN ANSWER TO WOULD ADMIT THEIR EXISTENCE, WHICH WAS ONE OF THE GROUNDS FOR BRINGING THE MOTION.

IT WOULD ALSO ACKNOWLEDGE HER CUSTODY AND CONTROL, WHICH WAS A SECOND GROUND FOR BRINGING THE MOTION UNDER THE ACT OF THE PRODUCTION DOCTRINE, AND IT COULD AUTHENTICATE THE DOCUMENTS, WHICH WAS THE THIRD GROUND.

SO, IN ANSWER TO A QUESTION, IT WOULD CONSTITUTE A WAIVER, PROBABLY, OF THE - CERTAINLY OF THE FIFTH AMENDMENT PRIVILEGE AND, IF APPLICABLE, THE ATTORNEY-CLIENT PRIVILEGE.

SO THE ONLY THING I COULD TELL MISS BAKER TO DO UNDER THE CIRCUMSTANCES CREATED EXCLUSIVELY [SIC] BY THE PEOPLE AT THE OTHER END OF THE TABLE WAS TO ADVISE HER TO TAKE THE FIFTH AMENDMENT, WHICH I DID.

NOW WE'RE BEFORE YOU, AND PROBABLY THEY ARE [p. 47] SEARCHING MY OFFICE.

THE COURT: DO YOU WANT TO RESPOND, MR. CONN?

MR. CONN: YES.

AS I SAID, AS FAR AS PROCEEDING BOTH WAYS SIMULTANEOUSLY, THAT IS, THE WITNESS WAS ORDERED TO APPEAR BEFORE THE GRAND JURY AND TO PRODUCE THE DOCUMENTS AND, AT THE SAME TIME, WE DID OBTAIN A SEARCH WARRANT.

THIS WAS SOMETHING THAT WE FULLY BRIEFED JUDGE POUNDERS ON, SO JUDGE POUNDERS WAS AWARE OF THE FACT THAT THERE WAS AN ONGOING GRAND JURY HEARING AT THE TIME HE ISSUED THE SEARCH WARRANT.

AND I AGREE, THERE IS AN INVESTIGATING OFFICER AT THIS TIME EN ROUTE TO SEARCH HIS OFFICE.

SO I THINK, PERHAPS, THE SIMPLEST SOLUTION WOULD BE THE COURT CAN DELAY OR SUSPEND ANY RULING ON THIS MATTER UNTIL THE OFFICER HAS HAD TIME TO RECOVER THE DOCUMENTS FROM THE SANTA MONICA OFFICE OF COUNSEL IF HE DOES, IN FACT, RECOVER THE DOCUMENTS.

AND I THINK THIS ISSUE WILL BE MOOT BECAUSE, AS I SAID, WE ARE NOT ASKING THAT THE WITNESS BE HELD IN CONTEMPT IF WE DO, IN FACT, GET THE DOCUMENTS.

I UNDERSTAND SHE TURNED THOSE OVER TO HER ATTORNEY AND WAS ACTING UNDER ADVISE OF COUNSEL.

IF WE DO NOT RECOVER THE DOCUMENTS, THEN I THINK WE WILL BE FACED ONCE AGAIN WITH THE ISSUE OF CONTEMPT.

MR. GABBERT: MAY I ASK TWO POINTS?

FIRST OF ALL, AT THE TIME MY CLIENT PURPORTEDLY [p. 48] MADE THE STATEMENT THAT SHE HAD TURNED THE DOCUMENTS OVER TO HER COUNSEL, SHE WAS KNOWN TO BE REPRESENTED BY COUNSEL.

MR. ZOELLER KNEW THAT; BOTH DEPUTY DISTRICT ATTORNEYS KNEW THAT.

THEY KNEW BECAUSE THEY HAD SOUGHT MEETINGS WITH MY CLIENT, THOUGH THEY WERE NOT GOING TO BE TALKING TO HER ABSENT A GRANT OF IMMUNITY.

WHEN THEY EXECUTED THE WARRANT, THEY PROCEEDED TO QUESTION MY CLIENT IN A SITUATION THAT IF IT IS NOT LITERALLY CUSTODIAL, CERTAINLY IT HAS MANY OF THE TRAPPINGS.

BECAUSE I THINK WHEN YOU HAVE TWO DEPUTIES DISTRICT ATTORNEY AND TWO POLICE OFFICERS IN YOUR BEDROOM ON A FRIDAY EVENING, THAT'S A FAIRLY COERCIVE CIRCUMSTANCE. AND I DON'T KNOW THAT ANYONE WOULD FEEL FREE TO LEAVE.

NOW, I HAVEN'T BRIEFED THE ISSUE OF WHETHER THE RIGHT TO COUNSEL ATTACHED, BECAUSE IT IS A PRE-INDICTMENT SITUATION. AND THE FEDERAL RULE IS NO EXCEPTION WHEN IT DOES.

I HAVEN'T LOOKED AT THE STATE RULE ON IT, BUT IT'S CLEAR TO ME THAT THERE SHOULD HAVE BEEN NO QUESTIONING OF MY CLIENT.

THEY HAD BEEN TOLD NOT TO DO THAT, AND CERTAINLY WITH RESPECT TO THE DISCIPLINARY RULES OF THE STATE BAR, THE COMMUNICATION WITH A REPRESENTED PARTY IS FORBIDDEN.

[p. 49] SO IF SHE MADE THOSE STATEMENTS, I CLEARLY DON'T THINK THEY ARE VOLUNTARY AND I DON'T THINK THEY WOULD CONSTITUTE A WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE, AND I DON'T THINK THEY SHOULD CONSTITUTE ANY TYPE OF ADMISSION ON HER BEHALF BECAUSE OF THE CONTEXT IN WHICH THEY WERE MADE.

ALSO, IF THE COURT DOES WHAT COUNSEL SUGGESTS, YOU WILL BE SAYING, IN EFFECT, ALTHOUGH I DON'T KNOW THAT YOU WOULD AGREE, DE JURE, BUT DE FACTO, THAT EVERYTHING THEY HAVE DONE IS JUST FINE AND THIS IS HOW WE OUGHT TO CONDUCT OUR GRAND JURIES IN LOS ANGELES COUNTY.

AND IF YOU DON'T DO WHAT WE SAY, WE GET SEARCH WARRANTS FOR EVERYWHERE, AND THERE IS NO REASON TO HAVE COUNSEL, TO PREPARE MOTIONS, TO QUASH SUBPOENAS THAT



COULD BE INCRIMINATING IN THE ABSENCE OF IMMUNITY.

AND THE DUE PROCESS CONSIDERATIONS THAT ARE INHERENT IN THE PRE-INDICTMENT CONTEXT HAVE NO APPLICATION.

AND THE FACT THAT IN AN EX PARTE - IN ANOTHER EX PARTE PROCEEDING A PROSECUTOR HAS PERSUADED ANOTHER JUDGE OF THIS COURT THAT WHAT THE CONTENTS OF THE OBJECTS HE SEEKS TO FIND, THE EXISTENCE OF WHICH HE DOES NOT KNOW, ARE SUCH THAT HE CAN CIRCUMVENT THE DISPOSITION OF THIS MATTER IN A COURT OF LAW AND RESULT TO THE SEARCH WARRANT PROCESS BOTH TO MY CLIENT, AS TO MY PERSON, MY BRIEFCASE AND MY EFFECTS, MY OFFICE.

I SUBMIT TO YOU THAT I DON'T THINK THAT'S APPROPRIATE. I THINK WE SHOULD HAVE A RULING ON THIS ISSUE.

[p. 50] THE RULING MAY RENDER THE WHOLE MATTER MOOT, SO RATHER THAN DO NOTHING, AS COUNSEL WOULD HAVE-YOU DO, AND GIVE THE IMPRIMATUR OF APPROVAL OF THE PROCEDURE, I WOULD ASK THE COURT TO RULE ON THE ISSUES THAT I COULD IN GOOD FAITH - COULD NOT GET ANYONE TO FILE, MUCH LESS HEAR, BEFORE THE WHOLE SITUATION WAS CREATED.

THE COURT: WELL, AS FAR AS THE PROCEEDINGS THAT I'M HEARING ABOUT, WHILE THEY ARE UNUSUAL, I DON'T BELIEVE THERE IS ANYTHING IMPROPER THAT'S HAPPENING HERE.

BECAUSE I THINK JUDGE POUNDERS CERTAINLY COULD HAVE PROPERLY FOUND THAT THERE IS PROBABLE CAUSE TO BELIEVE THAT THESE LETTERS, IF THEY EXIST, ARE EVIDENCE OF A CRIME COMMITTED BY LYLE MENENDEZ.

SO WE REALLY HAVE TWO SEPARATE PROCEEDINGS GOING.

I WILL STATE FOR THE RECORD, WHEN I CALLED THE ATTORNEY, THE GRAND JURY ADVISOR, INTO THE CHAMBERS ON RECORD, MY QUESTION TO HIM WAS, "IS THIS A GRAND JURY PROCEEDING SEEKING AN INDICTMENT AGAINST MISS BAKER?"

AND I WAS TOLD, "THIS IS A GRAND JURY INVESTIGATION AND NO INDICTMENT IS BEING SOUGHT NOW."

ON THE OTHER HAND, IT CERTAINLY APPEARS THAT AN INDICTMENT IS A POSSIBILITY AGAINST MISS BAKER BASED ON WHAT IS UNCOVERED BY THE GRAND JURY AND AS A RESULT OF THIS INVESTIGATION.

BUT CLEARLY THE PROSECUTION IS INTERESTED IN TWO SEPARATE THINGS:

ONE IS EVIDENCE AGAINST MR. MENENDEZ; AND, [p. 51] THE OTHER MAY BE EVIDENCE AGAINST MISS BAKER.

I'M PROBABLY NOT GOING TO SATISFY ANYBODY VERY MUCH BECAUSE I'M NOT PREPARED TO RULE ON THE FIFTH AMENDMENT ISSUE SIMPLY BECAUSE WHETHER PRODUCTION OF DOCUMENTS

IS THE INCRIMINATING EVENT, I HAVE NOT READ ANY OF THESE NICE FEDERAL CASES.

MY PRELIMINARY REACTION TO IT IS IT'S PROBABLY AN ISSUE THAT RAISES PRIVILEGE AND PROBABLY THE FIFTH AMENDMENT APPLIES AND THAT SHE WOULD BE ENTITLED TO A GRANT OF IMMUNITY BEFORE SHE COULD BE COMPELLED TO PRODUCE THESE DOCUMENTS.

I THINK THE PRODUCTION OF THE DOCUMENTS BY HER BOTH ACKNOWLEDGES THEIR RECEIPT BY HER.

THERE IS NO WAY SHE COULD COME INTO POSSESSION OF THESE LETTERS, I'M SURE, UNLESS LYLE WOULD HAVE MAILED THEM TO HER AND ALSO AUTHENTICATES THEM.

AND I THINK THAT'S INCRIMINATING.

THAT'S JUST MY THRESHOLD OPINION, AND I HAVE CHANGED MY MIND BEFORE WITH THE ASSISTANCE OF RESEARCH. BUT THAT'S WHERE I THINK WE ARE.

BUT THIS MAY BE ACADEMIC.

IF, IN FACT, THE DOCUMENTS ARE RECOVERED BY SEARCH WARRANT, THEN THE PEOPLE MAY HAVE NO FURTHER INTEREST IN EITHER TESTIMONY OR DOCUMENTS FROM MISS BAKER.

SO I'M GOING TO TAKE IT UNDER SUBMISSION TO GIVE ME AN OPPORTUNITY TO DO THE RESEARCH.

I THINK WHAT I'D BEST DO IS RESCHEDULE IT AND GIVE YOU A RETURN DATE RATHER THAN WAIT TO HEAR FROM YOU.

[p. 52] AND IF, IN FACT, IT WORKS OUT, YOU CAN LET ME KNOW AND WE CAN TAKE IT OFF CALENDAR.

WHAT DO YOU THINK, IN TERMS OF TIME?

WHEN DO YOU THINK YOU'LL KNOW WHETHER A SEARCH WARRANT PRODUCED THE INFORMATION YOU NEED?

MR. CONN: PERHAPS WEDNESDAY.

WE ARE GOING TO BE APPEARING ON THE SAME CASE IN ANOTHER COURT TOMORROW.

WE WOULD ASSUME BY WEDNESDAY WE WILL KNOW WHAT THE SEARCH WARRANT REVEALED.

THE COURT: MAYBE THE AFTERNOON WOULD BE EASIER FOR ME. THAT WOULD GIVE ME PLENTY OF TIME.

LET ME TRAIL THIS, THEN, TO WEDNESDAY, MARCH 14, AT 1:30.

MR. CONN: MISS NAJERA POINTED OUT - WOULD IT BE POSSIBLE TO DO IT ON THURSDAY?

IS THAT ALL RIGHT WITH EVERYBODY?

MR. GABBERT: THURSDAY AFTERNOON?

MR. CONN: OR MORNING, ACTUALLY.

MR. GABBERT: I CAN'T DO IT THURSDAY AFTERNOON.



I COINCIDENTALLY HAVE ANOTHER CLIENT BEFORE A FEDERAL GRAND JURY ON THURSDAY MORNING IN A TOTALLY UNRELATED MATTER.

THE COURT: THAT'S AN UNUSUAL SPECIALTY, BUT THERE YOU ARE.

IS THURSDAY MORNING ALL RIGHT?

MR. GABBERT: THURSDAY MORNING IS WHEN I HAVE TO BE THERE.

[p. 53] SO, FOR ME, IT WOULD HAVE TO BE THURSDAY AFTERNOON.

THE COURT: THAT'S FINE.

THURSDAY AT 1:30?

THE CLERK: MARCH 24.

THE COURT: I THOUGHT TODAY WAS THE 12TH.

I'M A LITTLE CONFUSED.

MARCH 24.

ALL RIGHT.

MISS BAKER, UNLESS YOUR ATTORNEY INSTRUCTS YOU OTHERWISE, COME BACK TO THIS COURT ON THURSDAY, MARCH 24, AT 1:30.

MR. WHITE: I WOULD ASK THE COURT TO ADMONISH COUNSEL THAT THE GRAND JURY PROCEEDING - AND THIS IS A GRAND JURY PROCEEDING - IS CONFIDENTIAL AND THAT HE IS LIABLE UNDER THE PENALTY OF PERJURY - EXCUSE ME -

UNDER CONTEMPT OF COURT IF HE REVEALS ANYTHING THAT OCCURED [SIC] DURING THIS HEARING OR IF HE DOES BEFORE THE GRAND JURY -

MR. GABBERT: I HAVE ONE QUESTION THAT'S NOT CLEAR IN MY MIND.

I HAD RICHARD HIRSCH AND HIS PARTNER COME DOWN BECAUSE IN NEARLY 17 YEARS I HAD NEVER BEEN THE SUBJECT OF A SEARCH WARRANT. AND I THOUGHT IT WOULD BE APPROPRIATE IF I WERE REPRESENTED BY COUNSEL.

SO I'M NOT CLEAR WHETHER I CAN COMMUNICATE WITH MY COUNSEL ABOUT WHAT WENT ON IN HERE TODAY.

IT WOULD SEEM TO ME I COULD.

THE COURT: IF THE PEOPLE DISAGREE, THEY CAN SAY SO.

[p. 54] I THINK YOU CAN COMMUNICATE WITH YOUR ATTORNEYS ABOUT ANYTHING CONCERNING THE SEARCH WARRANT BUT NOT ABOUT ANY GRAND JURY TESTIMONY THAT WAS REQUIRED OF YOUR CLIENT OR DOCUMENTS THAT WERE REQUIRED BY THE GRAND JURY.

BUT ANYTHING REGARDING YOU AND THE SEARCH, YOU ARE FREE TO TALK TO YOUR ATTORNEYS.

MR. GABBERT: THANK YOU.

THE COURT: DO YOU HAVE ANY PROBLEM WITH THAT?

MR. CONN: NO, YOUR HONOR.

MR. GABBERT: I HAVE ONE FURTHER REQUEST. I'M SURE IT WON'T BE A PROBLEM.

IF I CAN JUST GET THESE DOCUMENTS STAMPED FILED, I WOULD BE VERY HAPPY.

THE COURT: WE CAN MARK THEM "RECEIVED," BUT THERE IS NO CASE NUMBER AND THERE IS NO CASE IN WHICH TO FILE THEM.

BUT WE WILL INDICATE ON YOUR COPIES THAT THEY WERE RECEIVED BY THIS COURT TODAY.

MR. GABBERT: THANK YOU.

THE COURT: THANK YOU.

(THE PROCEEDINGS WERE CONCLUDED.)

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\_\_\_\_\_

DEPT 101

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF LOS ANGELES

Date: May 19, 1995

HONORABLE: J. STEPHEN CZULEGER JUDGE  
E HOCKADAY Deputy Sheriff  
H KIM Deputy Clerk  
H THEISS Reporter

BH000656

People of the State of California  
vs.

In Re: Grand Jury subpoena for  
Tracy L. Baker (N/A)

(Parties and counsel checked if present)

Counsel for People

Deputy District Attorneys:

Assistant County Counsel: F BENNETT (X)

Counsel for Defendant:

Counsel for witness: V PODBERESKY, PVT (X)

Counsel for Petitioner: M LIGHTFOOT, PVT (X)

Paul Gabbert (N/A) M WIDDIFIELD, PVT (X)

NATURE OF PROCEEDINGS

PETITION FOR DISCLOSURE

Matter is called for hearing re petitioner Gabbert's petition for disclosure of Grand Jury transcript and related documents, etc.



MINUTES ENTERED  
5/19/95  
COUNTY CLERK

/s/ Richard Colby CSR 1080  
OFFICIAL REPORTER

## EXHIBIT 10

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES  
DEPARTMENT NO. 101 HON. J. STEPHEN

HON. J. STEPHEN  
CZULEGER, JUDGE

IN RE THE MATTER OF	)	CASE NO.
GRAND JURY	)	BH000656
SUBPOENA FOR TRACY L.	)	
BAKER,	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
FRIDAY, MAY 19, 1995

**APPEARANCES:**

FOR THE RESPONDENT: DE WITT W. CLINTON  
COUNTY COUNSEL  
BY: FREDERICK R.  
BENNETT,  
ASSISTANT COUNTY  
COUNSEL  
648 HALL OF  
ADMINISTRATION  
500 WEST TEMPLE  
STREET  
LOS ANGELES,  
CALIFORNIA 90012

FOR THE PETITIONER  
PAUL L. GABBERT:

TALCOTT, LIGHTFOOT,  
VANDEVELDE,  
WOEHRLE & SADOWSKY  
BY: MICHAEL J.  
LIGHTFOOT AND  
MELISSA  
N. WIDDIFIELD  
655 SOUTH HOPE  
STREET, 13TH FLOOR  
LOS ANGELES,  
CALIFORNIA 90017

FOR THIRD PARTY  
WITNESS, TRACY BAKER:

**HIRSCH, NASATIR &  
PODBERESKY  
BY: VICKI I.  
PODBERESKY  
2115 MAIN STREET  
SANTA MONICA,  
CALIFORNIA 90405**

**M. HELEN THEISS, CSR,  
#2264  
OFFICIAL COURT  
REPORTER**

[p. 1] LOS ANGELES, CALIFORNIA,  
FRIDAY, MAY 19, 1995  
8:45 A. M.

DEPARTMENT NO. 101  
HON. J. STEPHEN CZULEGER, JUDGE

**APPEARANCES:**

FREDERICK R. BENNETT, ASSISTANT COUNTY COUNSEL, FOR THE COUNTY OF LOS ANGELES, APPEARING FOR THE RESPONDENTS, DAVID CONN AND CAROL NAJERA; MICHAEL J. LIGHT-FOOT AND MELISSA N. WIDDIFIELD, ATTOR-NEYS AT LAW, APPEARING FOR PETITIONER,



PAUL L. GABBERT; VICKI I. PODBERESKY, ATTORNEY AT LAW, APPEARING ON BEHALF OF TRACY L. BAKER, THIRD PARTY WITNESS.

(M. HELEN THEISS, CSR #2264, OFFICIAL REPORTER.)

THE COURT: LET ME CALL THE CASE OF IN RE GRAND JURY SUBPOENA FOR TRACY L. BAKER.

COUNSEL, PLEASE MAKE YOUR APPEARANCES FOR THE RECORD.

MR. LIGHTFOOT: MICHAEL LIGHTFOOT AND MELISSA WIDDIFIELD APPEARING HERE ON BEHALF OF PAUL GABBERT.

MS. PODBERESKY: VICKI PODBERESKY APPEARING ON BEHALF OF TRACY BAKER.

MR. BENNETT: FREDERICK BENNETT, ASSISTANT COUNTY COUNSEL HERE AT THE REQUEST OF THE COURT.

THE COURT: MR. BENNETT THIS WAS A NOTICED MOTION ON FOR 8:30. I ASKED FOR PAPERS TO BE FILED LAST FRIDAY. WE NEVER HEARD ANYTHING FROM YOUR OFFICE. WE CALLED YOUR [p. 2] OFFICE ON MONDAY AND THEY SAID, "WE ARE NOT OPPOSING IT." MY CLERK ASKED, "HOW ARE WE SUPPOSED TO KNOW? WE HAVE TO HAVE SOMETHING IN WRITING." WE GOT SOMETHING ON TUESDAY. IT IS STILL A MOTION AND I HAD NOT EXCUSED COUNSEL FROM ATTENDING A NOTICED MOTION.

MR. BENNETT: OUR OFFICE REPRESENTS THE DISTRICT ATTORNEY AND THE DEFENDANTS IN THE UNDERLYING ACTION, THAT'S BEING HANDLED BY AN ATTORNEY IN OUR OFFICE BY THE NAME OF KEVIN BRAZILE. HE WAS INSTRUCTED TO FILE A STATEMENT OF NON OPPOSITION.

I MIGHT INDICATE THERE WAS SOME CONFUSION EARLY ON BECAUSE I RECEIVED SOME COMMUNICATIONS FROM MS. WIDDIFIELD, I GUESS, AND I WAS UNAWARE THAT OUR OFFICE WAS INVOLVED IN THE LITIGATION. SO THERE WAS INITIALLY SOME INVOLVEMENT ON OUR PART, BUT IT IS OUR OFFICE THAT IS HANDLING THIS MATTER THROUGH KEVIN BRAZILE. HE IS ASSIGNED TO THE UNDERLYING CASE. I AM TAKING NO - AS A RESULT WE ARE TAKING NO INDEPENDENT POSITION WITH REGARDS TO ANY OTHER PERSON.

THE COURT: ALL RIGHT.

WELL, I DON'T KNOW ABOUT THE OTHER PEOPLE. I HAD SOME QUESTIONS THOUGH. INITIALLY COUNTY COUNSEL TOOK THE POSITION, I THINK IT WAS YOUR LETTER, THAT THEY WOULD NOT TURN OVER THE GRAND JURY MATERIAL BECAUSE - YOUR LETTER OF APRIL 14, 1995 - BECAUSE IT WAS COVERED IN THE SECRECY RULES OF THE GRAND JURY

MR. BENNETT: WAS THAT THE REQUEST FOR THE BAILIFF LOGS, THAT LETTER, OR FOR A TRANSCRIPT?

[p. 3] MS. WIDDIFIELD: YOUR HONOR, IF I MIGHT.

THIS LETTER WAS A RESPONSE TO A SUBPOENA FOR THE GRAND JURY TRANSCRIPT.

MR. BENNETT: THAT WAS A SUBPOENA IN FEDERAL COURT.

THE COURT: CORRECT.

MR. BENNETT: AND WE FILED A STATEMENT THERE UNDER THE FEDERAL RULES THAT IT WOULD NOT BE PRODUCED. NOW, THAT WAS IN THE FEDERAL COURT, I BELIEVE.

THE COURT: CORRECT.

MR. BENNETT: NOW, A MOTION HAS BEEN MADE TO THE SUPERIOR COURT WHICH SUPERVISES THE GRAND JURY. I THINK THAT'S IN A DIFFERENCE [sic] STATURE, ITS A NARROWLY DRAWN MOTION FOR A TRANSCRIPT WHICH I BELIEVE GOES DIRECTLY TO THE CREDIBILITY OF A WITNESS. UNDER THE CIRCUMSTANCES OF THE MOTION WE HAVE NOT ASSERTED ANY GROUNDS TO OPPOSE THAT MOTION.

THE COURT: OKAY.

THE QUESTION I HAVE IS DOES THE COUNTY COUNSEL HAVE THE GRAND JURY TRANSCRIPT AND INFORMATION?

MR. BENNETT: IT REPRESENTS THE CLIENTS WHO HAVE KNOWLEDGE AND POSSESSION OF A COPY OF THAT TRANSCRIPT.

THE COURT: SO YOUR ANSWER IS, YES, THE COUNTY COUNSEL DOES HAVE A COPY OF THE TRANSCRIPT?

MR. BENNETT: IT REPRESENTS CLIENTS WHO HAVE POSSESSION OF IT AND KNOWLEDGE OF IT.

THE COURT: I UNDERSTAND THAT.

CAN YOU ANSWER MY QUESTION?

MR. BENNETT: I DON'T KNOW PERSONALLY THE ANSWER TO [p. 4] THAT QUESTION.

THE COURT: THE REASON I ASK IS AS YOU CITE IN THAT LETTER THE SECRET GRAND JURY, YOU KNOW THAT I SUPERVISE A LOT OF GRAND JURY MATERIAL MY QUESTION IS WHY DOES COUNTY COUNSEL IN CIVIL LITIGATION HAVE

WHICH SHOULD BE SECRET GRAND JURY MATERIAL?

MR. BENNETT: ONE, THE DISTRICT ATTORNEY CLEARLY HAS LAWFUL POSSESSION AND KNOWLEDGE. THEY ARE SUED AS DEFENDANTS WITH REGARDS TO THAT AND I DON'T KNOW HOW A CLIENT IGNORES KNOWLEDGE THAT THEY KNOW IN DEFENSE OF A MATTER AND THEIR ATTORNEY CERTAINLY KNOWS WHATEVER THEY KNOW.

THE COURT: I MIGHT AGREE WITH YOU EXCEPT THERE IS A QUESTION ABOUT WHETHER A DISTRICT ATTORNEY HAS THE AUTHORITY TO DISCLOSE WITHOUT COURT ORDER IN A CIVIL LITIGATION TO THE LAWYERS. THIS IS UNRELATED TO THE CRIMINAL MATTER. THIS IS NOT RELATED TO THE CRIMINAL CASE, GRAND JURY MATERIAL WHICH SHOULD BE SECRET, THAT'S THE QUESTION.

MR. BENNETT: INTERESTINGLY ENOUGH IN ALL OF THE STATUTES ON SECRECY THERE IS NO STATUTE THAT IS DIRECTLY RELATED TO WHAT A DISTRICT ATTORNEY MAY OR MAY NOT DISCLOSE.

THE COURT: ITS INTERESTING BUT IF YOU READ THERE IS TWO WAYS A TRANSCRIPT CAN BE DISCLOSED. EITHER 10 OR 20 DAYS AFTER AN INDICTMENT IS RETURNED IT CAN BE MADE AVAILABLE, IF THERE IS NO INDICTMENT THAT IS RETURNED THEN UPON APPLICATION TO THE COURT THE TRANSCRIPT CAN BE [p. 5] DISCLOSED EITHER TO A DEFENDANT IN A CRIMINAL CASE OR TO THE DISTRICT ATTORNEY, WHICH WOULD LEAD ONE TO BELIEVE THAT, AND THERE IS NO INDICTMENT RETURNED, I GATHER, FROM THIS INVESTIGATION, THAT ONE WOULD HAVE TO MAKE AN APPLICATION TO THE COURT TO DISCLOSE THE TRANSCRIPT.



MR. LIGHTFOOT: THE DISTRICT ATTORNEY IS PRESENT DURING THE PRESENTATION OF THAT TESTIMONY.

THE COURT: RIGHT.

MR. BENNETT: AND IN THAT PROCESS IS IN POSSESSION OF THE EXHIBITS, MATERIALS AND TRANSCRIPT, AND IS FREE TO USE IT OFFICIALLY. NOW, THEY CAN BE SUED, I PRESUME, WITH REGARDS TO WHAT THEY KNOW, THAT KNOWLEDGE, AND IN SEEKING LEGAL ADVICE OVER THEIR REPRESENTATION THEIR ATTORNEY, I THINK, IS IN THEIR SAME STEAD.

NOW, THERE IS NO CASE ON THAT, THERE IS NO ISSUE ON THAT, THERE IS NO STATUTE THAT SPECIFICALLY DEALS WITH THE DUTY OF A DISTRICT ATTORNEY IN THAT REGARD. AS A MATTER OF FACT, OUR OFFICE PROVIDES LEGAL ADVICE GENERALLY TO THE DISTRICT ATTORNEY AND THEY WOULD BE FREE TO SEEK OUR ADVICE CONCERNING PRESENTATION OF MATTERS TO THE GRAND JURY.

AS YOU KNOW WE HAVE A DUAL ROLE WITH REGARD TO THE GRAND JURY GENERALLY, WHICH IS THE GRAND JURY MAY SEEK THE ADVICE OF COUNSEL, OF THE DISTRICT ATTORNEY, AS TO ANY MATTER, NOT JUST THE ADVISOR BUT THE DISTRICT ATTORNEY OR ANY OF HIS DEPUTIES, AS TO ANY MATTER. AND I PRESUME IN SEEKING THAT ADVICE THEY ARE FREE TO DISCUSS WITH HIM THINGS ESSENTIAL TO SEEKING THAT ADVICE.

[p. 6] WE ARE FREE TO PROVIDE ADVICE ON CIVIL MATTERS TO A GRAND JURY. WE ARE NOT ENTITLED TO BE PRESENT BUT IN THAT RELATIONSHIP AND UNIQUE CIRCUMSTANCES OF THIS CASE WHERE, AS I UNDERSTAND IT, I AM NOT THE

ATTORNEY ASSIGNED THE DEFENSE OF THAT CASE, WHERE HIS CLIENTS HAVE KNOWLEDGE AND LAWFUL POSSESSION OF A MATTER OVER WHICH THEY ARE SUED IN SEEKING CONFIDENTIAL LEGAL ADVICE FROM THEIR COUNSEL. I THINK THAT THEY ARE FREE TO DISCUSS WHAT THEY KNOW, IF IT IS NECESSARY TO THAT PROPER ADVICE.

THE COURT: BUT DON'T YOU THINK IT WOULD BE SAFE TO SEEK AUTHORITY OF THE COURT?

MR. BENNETT: IF I WERE THE ATTORNEY HANDLING THAT CASE THAT'S WHAT I WOULD HAVE DONE.

THE COURT: LET'S PUT IT THIS WAY: IF UNDERSTAND THE FEDERAL RULES, WE ARE NOT - I AM SURE YOU ARE FAMILIAR WITH RULE 6E OF THE FEDERAL CRIMINAL RULES, YOUR CLIENT WOULD BE FACING A CONTEMPT OF COURT FOR DISCLOSING IT. THE PROBLEM IS A LOT OF THE GRAND JURY SECRECY RULES ON THE STATE SIDE ARE VAGUE AND SOMETIMES CONFUSING, BUT YOU RAISE THE ISSUE IN YOUR LETTER BACK TO COUNSEL THAT THERE ARE SECRECY RULES THAT YOU ARE GOING TO COMPLY WITH, BUT AS I UNDERSTOOD THE AFFIDAVIT YOU ARE SAYING THAT YOU ARE GOING TO BE USING THAT SAME MATERIAL IN THE COURSE OF A DEPOSITION WHICH WOULD, OF COURSE, BE DISCLOSING MATERIAL.

MR. BENNETT: I AM NOT INVOLVED WITH REPRESENTATION OF THOSE CLIENTS. I HAVE GOT TO TELL YOU AS A PRACTICAL [p. 7] MATTER THE ATTORNEY WHO IS THERE DOESN'T HAVE ANY EXPERTISE IN GRAND JURY MATTERS, AND QUITE FRANKLY HAD MS. WIDDIFIELD ADVISED ME THAT THAT CASE WAS BEING HANDLED BY OUR OFFICE I

COULD HAVE DEALT WITH IT IN A DIFFERENT MANNER. I AM NOT SAYING THAT SHE INTENTIONALLY DIDN'T SAY IT, SHE MAY HAVE ASSUMED THAT I KNEW THAT WHEN THAT MATTER FIRST CAME THERE.

I DID NOT KNOW THAT THIS MATTER RELATED TO SOMETHING OVER WHICH SOMEBODY IN OUR OFFICE HAD BEEN ADVISED, AND HAD THAT PERSON COME TO ME EARLY ON I WOULD HAVE, IF NOTHING ELSE OTHER THAN JUST COURTESY TO THE COURT AND THE PROCESS, HAVE ADVISED HIM TO PROCEED A LITTLE BIT DIFFERENTLY. BUT I WILL SAY THIS, IN MY OPINION THERE IS NOT A SINGLE BASIS FOR CONTEMPT IN THIS MATTER AND I HAVE A VERY GOOD UNDERSTANDING OF THE -

THE COURT: I AM NOT SUGGESTING THAT.

MR. BENNETT: NOR DO I BELIEVE THAT THAT DEPUTY HAS DONE ANYTHING WRONG. I BELIEVE HE HAS OPERATED PERFECTLY LAWFULLY.

THE COURT: MR. BENNETT, YOU MISS THE POINT OF MY QUESTION. I AM MAKING INQUIRIES BECAUSE JUST TWO WEEKS AGO I GOT A REQUEST FROM YOUR OFFICE TO HAVE GRAND JURY TRANSCRIPTS RELEASED, WHICH WAS AN APPROPRIATE REQUEST AND HANDLED APPROPRIATELY AND NOW I FIND A SITUATION WHERE YOUR OFFICE ALREADY HAS GRAND JURY TRANSCRIPTS, AND SINCE I SUPERVISE MUCH OF THE GRAND JURY STUFF AND I AM TRYING TO FIND OUT WHAT IS HAPPENING AND I AM FINDING OUT A GREAT DEAL THAT HAPPENED THAT FRIGHTENS ME. THAT IS WHY I [p. 8] WANTED COUNTY COUNSEL HERE TO FIND OUT WHAT IT IS, WHAT IS YOUR OFFICE'S POSITION, THAT'S WHY I AM MAKING THE INQUIRY. I HAVE NEVER SUGGESTED THAT CONTEMPT IS AN

AVAILABLE HERE BECAUSE THERE IS NO AUTHORITY FOR CONTEMPT HERE.

MR. BENNETT: I WOULD SAY THAT IN THE CIRCUMSTANCES WHERE THE DISTRICT ATTORNEYS HAVE LAWFUL KNOWLEDGE OF, LAWFUL POSSESSION OF A TRANSCRIPT OVER WHICH THEY HAVE BEEN SUED AND THEY SEEK LEGAL ADVICE THAT OUR OFFICE IS 100 PERCENT ENTITLED TO KNOW WHAT ALL OF THE DISTRICT ATTORNEY'S DO IN THAT RELATIONSHIP.

NOW, WHETHER THEY CAN USE IT AND SUBMIT THAT TRANSCRIPT IN EVIDENCE I THINK REQUIRES A COURT ORDER. MY UNDERSTANDING IS THAT HASN'T OCCURRED, THAT THAT TRANSCRIPT HASN'T BEEN RELEASED TO ANYBODY.

THE COURT: ALL RIGHT.

WELL, OTHER THAN YOUR OFFICE EVIDENTLY -

MR. BENNETT: I DON'T KNOW THAT, BUT I AM SURE WE HAVE KNOWLEDGE OF IT BECAUSE WE ARE REPRESENTING CLIENTS WHO HAVE KNOWLEDGE OF IT AND THOSE CLIENTS ARE ENTITLED TO FREE AND UNINHIBITED ADVICE FROM THEIR ATTORNEY OVER THINGS THAT THEY KNOW. NOW, I HAVE NOT BEEN PRIVY TO THOSE, I DON'T KNOW WHAT WAS INVOLVED IN THAT ATTORNEY-CLIENT RELATIONSHIP AND I AM SURE WE COULD NOT BE COMPELLED TO DISCLOSE IT IN ANY EVENT, BUT IF THAT HAPPENS I BELIEVE THEY WERE LAWFULLY ENTITLED TO DO THIS.

THE COURT: ALL RIGHT.

COUNSEL WISH TO BE HEARD?

[p. 9] MR. LIGHTFOOT: YOUR HONOR, LET ME JUST CLARIFY SOMETHING FACTUALLY. THERE



WAS A DEPOSITION THAT TOOK PLACE JUST A MATTER OF A WEEKS AGO WHERE MR. GABBERT'S THEN CLIENT, WHO IS NOW REPRESENTED BY MS. PODBERESKY, TRACY BAKER, WHO IS THE WITNESS BEFORE THE GRAND JURY, SHE WAS DEPOSED BY MR. BRAZILE AND BY A LAW FIRM IN TOWN THAT REPRESENTS THE THIRD AND FOURTH DEFENDANTS, THE FIRST AND SECOND DEFENDANTS BEING THE PROSECUTORS IN THIS CASE FROM THE D.A.'S OFFICE, THE THIRD AND FOURTH DEFENDANTS ARE POLICE OFFICERS WITH THE BEVERLY HILLS POLICE DEPARTMENT AND A LAWYER IN TOWN WHO HAD BEEN APPOINTED AS A SPECIAL MASTER. THAT LAW FIRM WAS PRESENT DURING THE DEPOSITION OF MS. BAKER.

SOMETIME AFTER THE DEPOSITION OF MS. BAKER OUR OFFICE TOOK THE DEPOSITION OF THE GRAND JURY BAILIFF, A GENTLEMAN BY THE NAME OF FOX, MS. WIDDIFIELD TOOK THAT DEPOSITION. WHEN MR. FOX RECEIVED THE DEPOSITION, THE DEPOSITION NOTICE, APPARENTLY HE CONTACTED THIS GENTLEMAN WHO WAS NOT THE ATTORNEY FROM COUNTY COUNSEL'S OFFICE REPRESENTING THE TWO DISTRICT ATTORNEYS.

MR. BENNETT THEN CALLED MS. WIDDIFIELD AND MS. WIDDIFIELD TOLD HIM AT THAT POINT THAT IN FACT MR. BRAZILE FROM HIS OFFICE WAS REPRESENTING THE DISTRICT ATTORNEYS. MR. BRAZILE THEN, WE UNDERSTAND, AFTER CONFERRING WITH MR. BENNETT THEN WENT TO THE DEPOSITION WITH MR. FOX AND AS THE COUNTY COUNSEL REPRESENTED MR. FOX. IT WAS A PERIOD OF WEEKS AFTER THOSE EVENTS THAT MS. BAKER'S DEPOSITION TOOK PLACE. SO, THE COUNTY [p. 10] COUNSEL'S OFFICE, BOTH MR. BENNETT AND MR. BRAZILE, WERE CERTAINLY AWARE

OF ALL THE CIRCUMSTANCES BEFORE THE DEPOSITION OF MS. BAKER TOOK PLACE.

DURING THE DEPOSITION OF MS. BAKER WE UNDERSTAND THAT THE MATERIALS WHICH WERE OTHERWISE WITHIN THE VEIL OF SECRECY OF THE GRAND JURY WERE USED AT LEAST BY MR. BRAZILE, PERHAPS BY THE LAWYER FROM THE PRIVATE FIRM REPRESENTING THE TWO OTHER DEFENDANTS IN THIS CASE. SO, IN FACT IN RESPONSE, DIRECT RESPONSE TO YOUR HONOR'S QUESTION PUT TO MR. BENNETT A FEW MINUTES AGO, "HAS IT BEEN USED?" WE BELIEVE THAT IT HAS BEEN USED.

AS A MATTER OF FACT, WE BELIEVE THAT IT WAS BECAUSE I WAS PRESENT DURING THE DEPOSITION OF MR. GABBERT AND THAT WAS A DEPOSITION THAT TOOK PLACE BEFORE THE DEPOSITION OF MR. FOX AND MS. BAKER, AND THAT MR. BRAZILE WAS USING THE GRAND JURY TRANSCRIPT TO FORMULATE QUESTIONS OF MR. GABBERT. SO, TO THE EXTENT THAT WE HAVE ANY KNOWLEDGE IT SEEMS CLEAR TO US THAT THERE HAS BEEN USE OF THE GRAND JURY TRANSCRIPT.

NOW, LET ME JUST PASS FROM THAT TO SOMETHING ELSE. ON THE DATE THAT THIS MATTER, THAT THESE EVENTS TOOK PLACE IN THIS BUILDING THE EVENTS FIRST OCCURRED OUTSIDE AND AROUND THE GRAND JURY ROOM ITSELF. OBVIOUSLY MR. GABBERT DID NOT GO INTO THE GRAND JURY ROOM, ALTHOUGH HIS CLIENT DID.

LATE IN THE MORNING MR. GABBERT WAS ADVISED THAT THE DISTRICT ATTORNEY'S OFFICE HAD CONTACTED THE DUTY COURT HERE AND THE MATTER HAD BEEN ASSIGNED TO, I BELIEVE [p. 11] AT THE TIME IT WAS DEPARTMENT 109 RIGHT

ACROSS THE HALL, JUDGE FLORENCE MARIE COOPER WAS SITTING IN THAT DEPARTMENT AT THE TIME.

JUDGE COOPER HELD A HEARING ON THE DISTRICT ATTORNEY'S MOTION THAT CERTAIN ACTION BE TAKEN WITH RESPECT TO MR. GABBERTIS CLIENT, MS. BAKER. THE COURTROOM WAS LOCKED, MR. GABBERT ACTUALLY, AS YOUR HONOR KNOWS FROM THE PAPERS, HE HAD EARLIER BEEN THE SUBJECT OF THE EXECUTION OF A SEARCH WARRANT. HE HAD IN THE INTERIM CALLED COUNSEL TO GIVE HIM ADVICE. THOSE LAWYERS EVENTUALLY CAME DOWN TO THE COURTHOUSE, THEY WERE NOT ALLOWED INTO THE COURTROOM DURING THE HEARING THAT TOOK PLACE BEFORE JUDGE COOPER, OBVIOUSLY, BECAUSE IT WAS A SECRET PROCEEDING THAT INVOLVED THE GRAND JURY.

AT THE CLOSE OF THOSE PROCEEDINGS BEFORE JUDGE COOPER, THIS IS WHAT MR. GABBERT HAS TOLD US, HE AS WELL AS EVERYBODY ELSE IN THE COURTROOM WERE ADVISED THAT THEY WERE NOT TO DISCLOSE CERTAIN PORTIONS OF THAT HEARING BECAUSE THOSE MATTERS INVOLVED WHAT HAD HAPPENED INSIDE THE GRAND JURY ROOM AND MR. GABBERT -

THE COURT: WAS THAT AS A RESULT OF JUDGE COOPER'S ORDER OR BY DIRECTION OF THE GRAND JURY FOREPERSON.

MR. LIGHTFOOT: I UNDERSTAND IT WAS JUDGE COOPER THAT ORDERED THAT. WE HAVEN'T SEEN, I DON'T EVEN KNOW IF THERE IS A TRANSCRIPT OF THOSE PROCEEDINGS THAT EXISTS, BUT WE CERTAINLY HAVE NOT SEEN IT. MR. GABBERT HAS BEEN VERY CAREFUL WITH US, AS HIS LAWYERS, NOT TO SAY THINGS TO US THAT WOULD BE

IN VIOLATION OF THE ORDER THAT WAS ISSUED [p. 12] BY JUDGE COOPER.

THE COURT: THIS IS ONE OF THE OTHER PROBLEMS THAT I HAVE SEEN OVER THE LAST YEAR OR SO, PEOPLE GIVE ORDERS WITHOUT A WHOLE LOT OF AUTHORITY AS REGARDS THE GRAND JURY, OR PROFESSES TO HAVE AUTHORITY FOR THINGS WHEN IN FACT DOESN'T. FOR EXAMPLE, IT IS STANDARD PRACTICE FOR THE DISTRICT ATTORNEY'S OFFICE TO INSTRUCT WITNESSES THAT THEY ARE NOT TO DISCLOSE ANYTHING. I HAVE ASKED OVER THE LAST YEAR FOR SOMEONE TO GIVE ME ANY AUTHORITY FOR THAT.

MR. LIGHTFOOT: THERE IS NOTHING -

MR. BENNETT: THERE IS AN ATTORNEY GENERAL OPINION, YOUR HONOR, I WILL SAY -

THE COURT: HAVE YOU GOT A COPY OF IT? BECAUSE I HAVE BEEN TELLING THE DISTRICT ATTORNEY'S OFFICE FOR THE BETTER PART OF A YEAR, "GIVE ME SOME AUTHORITY," AND NOT A SINGLE PERSON HAS EVER BEEN ABLE TO FIND ANY AUTHORITY.

MR. BENNETT: THERE IS A PUBLISHED, WELL KNOWN OPINION THAT THE ATTORNEY GENERAL'S OFFICE HAS. I WILL BE PLEASED TO GET YOU ONE.

I WILL SAY THIS, I THINK THE REASONING OF THAT OPINION IS A LITTLE BIT SUSPECT BUT IN ESSENCE THE QUESTION IS, THERE IT SAYS, "AND DIRECTION FROM THE FOREMAN NOT FROM THE DISTRICT ATTORNEY THAT WITNESSES NOT DISCLOSE." THAT HAS BEEN CONSTRUED AS A JUDICIAL ORDER THAT IS ENFORCEABLE BY CONTEMPT BY THE ATTORNEY GENERAL'S OFFICE.



I MUST SAY IF I WERE TO WRITE THE OPINION I THINK I WOULD REACH A DIFFERENT RESULT. BUT IT HAS BEEN [p. 13] IN EXISTENCE A LONG TIME, IT HAS BEEN RELIED UPON JUDICIALLY AND APPARENTLY ACCEPTED AS THE RULE, BUT I WILL BE PLEASED TO GET YOU -

THE COURT: I WOULD APPRECIATE THAT. BUT I CAN TELL YOU NO ONE IN THE DISTRICT ATTORNEY'S OFFICE, WE ARE TALKING ABOUT, I SUPPOSE, SOME OF THEIR STELLAR LIGHTS THAT WORK IN THE SIMPSON CASE HAVE YET BEEN UNABLE TO TELL ME WHAT THE AUTHORITY IS, AND I HAVE LOOKED AT EVERY SINGLE GRAND JURY CASE UNDER STATE LAW AND I CAN'T FIND ANY AUTHORITY.

AS WE KNOW AN ATTORNEY GENERAL OPINION MAY BE INTERESTING BUT CERTAINLY IS NOT BINDING, BUT THE FACT THAT SOMEONE SAYS SOMETHING TENDS TO CAUSE OTHER PEOPLE TO DO THINGS AND THE FACT THAT PEOPLE DO THINGS DOES NOT NECESSARILY MEAN IT IS CREDIBLE.

MR. BENNETT: IF ANYBODY HAD ASKED ME I CERTAINLY WOULD HAVE PROVIDED THAT TO YOU, AND LIKE I SAY IT IS WELL-KNOWN IN THE FIELD AND I WOULD GUESS A DISTRICT ATTORNEY TRIAL LAWYER MIGHT WELL NOT KNOW IT BUT CERTAINLY MR. WHITE, WHO ADVISES THE GRAND JURY, IS AWARE OF THAT OPINION.

THE COURT: NO.

MR. BENNETT: MAYBE THAT'S WHY OUR OFFICE GETS PAID A LITTLE MORE. I DON'T KNOW.

THE COURT: I CAN TELL YOU OTHER FORMER DISTRICT ATTORNEYS WHO ARE BENCH OFFICERS HAVE NO IDEA AND SUPERVISORS OF

DISTRICT ATTORNEYS HAVE NO IDEA, SO WHEN YOU SAY WELL-KNOWN MAYBE IT IS WELL-KNOWN IN CERTAIN [p. 14] QUARTERS BUT -

MR. BENNETT: IT IS IN THE ANNOTATED CODES. I DON'T KNOW HOW A PERSON CAN MISS IT, ITS THERE.

MR. LIGHTFOOT: I MIGHT CONCLUDE MY REMARKS BY SAYING I WAS GOING TO END BY INDICATING THAT OUR OFFICE HAS HAD, WE HAVE MADE SEVERAL ATTEMPTS IN THE PAST FEW YEARS TO GET COUNTY GRAND JURY TRANSCRIPTS AND I REMEMBER ONE IN PARTICULAR WHERE I WAS IN BATTLE WITH MR. BENNETT QUITE COINCIDENTALLY BEFORE JUDGE COOPER AND THE COUNTY TOOK THIS VIGOROUS POSITION THAT NOTHING WITHIN THE GRAND JURY CONFINES COULD BE DISCLOSED OUTSIDE THE INDIVIDUALS WHO WERE WORKING WITH THAT PARTICULAR INVESTIGATION.

SO IT STRIKES ME AT LEAST UNUSUAL THAT IN THIS CASE THEY SEEM TO BE BACKING OFF UNDER PECULIAR CIRCUMSTANCES BECAUSE WHEN MS. BAKER'S DEPOSITION WAS ABOUT TO BE TAKEN AND MS. PODBERESKY MENTIONED THIS, BUT IN A CAPSULE, SHE TRIED AS BEST SHE COULD TO GET THE COUNTY COUNSEL TO PUT THE DEPOSITION OVER SO THAT WE COULD PURSUE A MOTION IN FRONT OF THIS COURT TO HAVE IT RELEASED FOR THE PURPOSES OF USE IN THE DEPOSITION AND MR. BRAZILE WOULD NOT PERMIT THAT AND THAT DEPOSITION - WE WENT OVER TO FEDERAL COURT AND SHE SOUGHT A STAY, SHE DIDN'T GET IT, THE DEPOSITION TOOK PLACE. THEY USED THE TRANSCRIPT IN PUTTING QUESTIONS TO MS. PODBERESKY' CLIENT AND MS. PODBERESKY AND MS.

WIDDIFIELD SAT THERE WITHOUT THE BENEFIT OF THE SAME DOCUMENTS.

SO, I THINK THE - WHAT WE SHOULD DO IS BECAUSE I THINK THAT MR. BENNETT IS ABSOLUTELY RIGHT, HE [p. 15] DOESN'T KNOW ANYTHING ABOUT THIS BECAUSE HE HASN'T BEEN INVOLVED IN THE CASE BUT MR. BRAZILE DOES AND THE LAWYERS WHO HAVE REPRESENTED MR. OPPENHEIM AND OFFICER ZOELLER THEY HAVE KNOWLEDGE AND I THINK WE SHOULD SET THIS DOWN FOR A HEARING AND THE COURT CAN INQUIRE OF THEM - IF I MAY FINISH FOR A SECOND, MR. BENNETT - THE COURT MAY INQUIRE OF THEM WHAT THE FACTUAL BACKGROUND OF THIS IS.

THE COURT: WELL, I AM GOING TO DENY THAT REQUEST.

THIS IS NOT AN OPPOSED MOTION I HAVE NO INTEREST IN CREATING ANY ADDITIONAL WORK. MY INTEREST IN BRINGING MR. BENNETT OVER IS TO GET ADDITIONAL INFORMATION.

I CAN TELL YOU, MR. BENNETT, HOW GRAND JURIES ARE RUN AND HOW OPERATIONS ARE CONDUCTED IN GENERAL AND ACROSS THE BOARD, MEANING EVERYONE THAT'S INVOLVED IN IT IN MY MIND IS VERY UNSATISFACTORY AND IT IS VERY FRAUGHT WITH DANGER. FOR EXAMPLE, WHERE YOU DO HAVE CIVIL LITIGATION AND ONE SIDE HAS THE ABILITY TO USE THE GRAND JURY OR HAS USED THE GRAND JURY AND HAS THE ADVANTAGE OF THAT IN CIVIL LITIGATION AND THEN AS HERE SAYS TO THE OTHER SIDE IN A CIVIL LITIGATION, "SORRY, YOU CAN'T HAVE IT. YOU CAN'T HAVE ACCESS," THAT IS VERY FRAUGHT WITH DANGER.

THE POSSIBILITY OF THE DISTRICT ATTORNEY'S OFFICE CONDUCTING AN INVESTIGATION IN A

GRAND JURY, AN EXPARTE PROCEEDING GATHERING EVIDENCE EITHER IN CONTEMPLATION OF CIVIL LITIGATION OR FOLLOWING CIVIL LITIGATION AND THEN COUNTY COUNSEL COMING IN AND SAYING, "WELL, I AM THEIR LAWYERS I HAVE THE RIGHT TO IT," IS A [p. 16] REAL POTENTIAL FOR SOME SUBSTANTIAL PROBLEMS. AS YOU KNOW, THE COURT SUPERVISES THE GRAND JURY, AND I HAVE A QUESTION ABOUT THAT. I WOULD ASK YOU TO THINK ABOUT IT WHEN YOU HAVE GRAND JURY MATTERS BECAUSE THERE ARE SOME PROBLEMS HERE THAT NEED TO BE ADDRESSED.

MR. BENNETT: THIS IS AN UNUSUAL CIRCUMSTANCE, ALTHOUGH -

THE COURT: ACTUALLY, I HAVE TO TELL YOU IT IS NOT FROM - BELIEVE ME I COULD GIVE YOU SOME HORROR STORIES ABOUT THE GRAND JURY IN THIS COUNTY AND SOME PROBLEMS THAT HAVE ARISEN.

MR. BENNETT: YOU CAN'T TELL ME HORROR STORIES ABOUT OUR OFFICE.

THE COURT: ABOUT THE GRAND JURY.

MR. BENNETT: I THINK SOMEBODY HAS KNOWLEDGE, THEY HAVE KNOWLEDGE. OKAY. AND IF THE DISTRICT ATTORNEY WAS REPRESENTING HIMSELF IN PRO PER BEING SUED AND HAVING A RIGHT TO ASK A QUESTION ABOUT THE SUIT THAT DEALS WITH WHAT OCCURRED AND HE ASKED A QUESTION BASED ON WHAT HE KNOWS HE CAN DO THAT. NOW, THE FACT THAT THIS MOTION IS MADE HERE IN THE PROPER COURT WE RECOGNIZE THE PROBLEM OF ONE SIDE HAVING IT AND THE OTHER SIDE NOT.

THE COURT: WHY DID YOU OPPOSE IT?



MR. BENNETT: WE OPPOSED IT IN FEDERAL COURT BECAUSE THE FEDERAL COURT HAS NO AUTHORITY TO ORDER IT IN OUR VIEW.

THE COURT: I DISAGREE. THEY CAN ISSUE A SUBPOENA AND COME OVER HERE AND TAKE EVERYTHING OUT OF OUR [p. 17] BUILDING.

MR. BENNETT: I CAN TELL YOU THAT I HAVE WORKED OVER THE YEARS WITH THE U.S. ATTORNEY'S OFFICE THEY HAVE ACKNOWLEDGED OUR POSITION IN THIS MATTER AND YOU WILL FIND THAT ALL OF THEIR MOTIONS ARE MADE HERE NOT IN FEDERAL COURT.

THE COURT: I AGREE. BUT ULTIMATELY IF THE FEDERAL JUDGE WANTED TO ISSUE AN ORDER SAYING, "CLEAR OUT THE 13TH FLOOR," WE BOTH KNOW WHAT WOULD HAPPEN.

I WOULD AGREE WITH YOU THE APPROPRIATE FORUM IS HERE. WHERE I DO HAVE A PROBLEM IS WHERE YOU SAY, "UNDER STATE LAW THIS IS A SECRET PROCEEDING. I HAVE IT, YOU DON'T. TOUGH." NOW, THE WAY TO HANDLE IT WOULD HAVE BEEN, IF YOU SAY, I THINK THAT'S A LITTLE UNFAIR THAT WE HAVE ALL THIS INFORMATION SUBMIT, AN ORDER, A STIPULATION TO THE COURT AND DO IT AS OPPOSED TO TAKING THIS POSITION WHAT ENDS WITH A NOTICED MOTION BEFORE ME.

MR. BENNETT: NOW, WE DID NOT STIPULATE TO ITS RELEASE, WE DID NOT OPPOSE ITS RELEASE. I THINK THERE IS A BIG DIFFERENCE.

MS. PODBERESKY: MAY I BE HEARD?

MR. BENNETT: WE HAVEN'T SAID THE COURT HAS AUTHORITY TO RELEASE IT.

THE COURT: I AM SORRY.

MR. BENNETT: WE HAVE NOT ARGUED THAT THE COURT HAS AUTHORITY TO RELEASE.

MS. PODBERESKY: MY INTERESTS IN REPRESENTING MS. BAKER ARE SOMEWHAT DIFFERENT THAN THE INTERESTS OF [p. 18] MR. GABBERT, AND I WOULD JUST LIKE TO BRIEFLY REVISIT THE REQUEST TO MAYBE HAVE SOME KIND OF TESTIMONY TAKEN IN CONNECTION WITH THIS ISSUE. THE PROBLEM I HAVE AT THIS JUNCTURE IS THAT I MADE TWO TO THREE REQUESTS TO MR. BRAZILE FOR DISCLOSURE OF THAT GRAND JURY TRANSCRIPT.

WHEN I WAS RETAINED TO REPRESENT MS. BAKER IT WAS THREE OR FOUR DAYS BEFORE HER ORIGINALLY SCHEDULED DEPOSITION AND I CALLED MR. BRAZILE AND SAID, "I HAVE BEEN ADVISED THAT YOU HAVE THIS GRAND JURY TESTIMONY. I AM TRYING TO PREPARE FOR THIS DEPO. COULD YOU RELEASE IT TO ME SO I CAN PREPARE, AND CAN WE CONTINUE THE DEPOSITION FOR A WEEK?" HE TOLD ME THAT, AND THIS IS ESSENTIALLY A QUOTE, "YOU DON'T NEED THE TRANSCRIPT. I CAN TELL YOU WHAT IS IN IT. SHE JUST ASSERTED HER FIFTH AMENDMENT RIGHT."

AND I THEN SAID, "WELL, THAT'S FINE, BUT I STILL NEED TO SEE IT FOR MYSELF IN ORDER TO ADVISE MY CLIENT." HE THEN INFORMS ME HE WOULD INQUIRE WITHIN HIS OFFICE OR WITH SOMEBODY TO SEE IF HE COULD DO THAT. HE NEVER GOT BACK TO ME WHETHER OR NOT HE WOULD RELEASE IT, AND I TOOK HIS SILENCE AS AN OPPOSITION TO RELEASING THAT TRANSCRIPT.

SUBSEQUENTLY, I THEN CALLED HIM TO SAY LOOK WE HAVE FILED A PETITION IN STATE COURT TO RELEASE THIS TRANSCRIPT. "CAN'T WE PUT THIS DEPOSITION OVER TWO DAYS OR THE DAY

AFTER SO THAT I CAN HAVE THE BENEFIT TO REPRESENT MY CLIENT ADEQUATELY?" HE DENIED THAT REQUEST AND DEMANDED THE DEPO GO FORWARD.

[p. 19] WHAT TROUBLES ME IS THE NON OPPOSITION TO THIS PETITION NOW APPEARS TO ME ALMOST AS THOUGH IT WAS A SANDBAGGING TACTIC. HE KNEW - IF THE POSITION OF THE COUNTY COUNSEL'S OFFICE IS THAT WHAT WE SHOULD HAVE DONE IS COME TO STATE OR REQUEST THE DISCLOSURE OF THE TRANSCRIPT THAT'S WHAT WE TRIED TO DO. I MAY BE AT FAULT BECAUSE I DID NOT DO IT QUICKLY ENOUGH BY ATTEMPTING TO GET UP TO SPEED TO FIND OUT ALL THE ISSUES IN THE CASE AND WHAT I NEEDED TO KNOW.

I FILED IN CONJUNCTION WITH MS. WIDDIFIELD AND MR. LIGHTFOOT'S OFFICE THIS PETITION, WHICH IS BEFORE THE COURT. IF THE COUNTY COUNSEL'S OFFICE WAS ACTING IN GOOD FAITH IT WOULD HAVE APPEARED TO ME OR SEEMS TO ME THAT HE WOULD HAVE SAID, "FINE. LET'S DEFER THIS DEPOSITION UNTIL THE COURT HAS RULED ON THIS PETITION BECAUSE YOU HAVE FOLLOWED THE APPROPRIATE PROCEDURE."

I NOTICED MR. BENNETT HAS CITED IN NUMEROUS PLACES IN A DIFFERENT CASE THAT ONE OF THE WAYS TO GET TRANSCRIPTS FROM A GRAND JURY IS TO PETITION THE COURT FOR DISCLOSURE, WHICH IS WHAT WE HAVE DONE HERE. NOW, MR. BRAZILE IS THREATENING TO TAKE ME TO COURT ON A MOTION TO COMPEL FURTHER ANSWERS FROM MY CLIENT.

BASED ON THE FACT THAT I DID NOT HAVE THE GRAND JURY TRANSCRIPT I ADVISED MY CLIENT TO ASSERT CERTAIN PRIVILEGES DURING THE COURSE OF THAT DEPOSITION, WHICH I MAY NOT HAVE

OTHERWISE ADVISED HER TO DO BUT NOT HAVING THE GRAND JURY TESTIMONY I ERRED ON THE SIDE OF CAUTION BASED ON WHAT I KNEW FROM MY DISCUSSIONS WITH HER, [p. 20] BASED ON WHAT I KNEW FROM THE CONTEXT OF THE GRAND JURY, HOW IT AROSE AND WHAT ITS FOCUS WAS.

I THEN HAD TO ASSERT CERTAIN PRIVILEGES. I AM NOW IN THE POSITION THAT MR. BRAZILE IS GOING TO DRIVE ME OVER TO FEDERAL COURT ON A MOTION TO COMPEL AND I WILL HAVE NO RULING OR ADVISEMENT FROM THIS COURT TO THE FEDERAL COURT ABOUT WHETHER OR NOT MR. BRAZILE'S FAILURE TO DISCLOSE THE GRAND JURY TRANSCRIPT TO ME WAS PROPER AND APPROPRIATE OR WHETHER HIS RECEIVING THE GRAND JURY TESTIMONY THERE INITIALLY WAS EVEN PROPER OR APPROPRIATE AND A VIOLATION OF GRAND JURY SECRECY.

AND IN FACT HE DID USE PORTIONS OF THAT TRANSCRIPT DURING THE DEPOSITION OF MY CLIENT. BECAUSE HE WAS READING VERBATIM OFF A PIECE OF PAPER SAYING, "DIDN'T YOU SAY THAT," AND QUOTING CERTAIN LANGUAGE THAT APPEARED TO ME TO BE A VERBATIM QUOTE FROM A GRAND JURY TRANSCRIPT. AND HE SO MUCH AS ADMITTED TO ME IN PRIOR TELEPHONE CONVERSATIONS THAT HE HAD POSSESSION OF THAT TRANSCRIPT.

SO, I AM ASKING THIS COURT TO HAVE MR. BRAZILE COME IN HERE TO MAKE FURTHER INQUIRIES SO AT LEAST I HAVE A RECORD WHEN I GO OVER TO FEDERAL COURT AND THE FEDERAL COURT CAN LOOK AT THIS GRAND JURY PROCEDURE AND MAKE SOME DETERMINATION AS TO WHETHER OR NOT A MOTION TO COMPEL MIGHT BE APPROPRIATE OR WHETHER SANCTIONS ARE



REQUIRED OVER IN THE FEDERAL COURT ACTION. OTHERWISE I THINK I AM - I DON'T THINK THE FEDERAL COURT IS GOING TO HAVE ANY AUTHORITY OR WILL WANT TO MAKE ANY KIND OF RULING AS TO WHAT THE STATE COURT LAW AND PROCEDURE IS WITH [p. 21] RESPECT TO THIS DISCLOSURE OF GRAND JURY MATERIAL. SO I AM ASKING THIS COURT TO HAVE A HEARING. -

THE COURT: YOU ARE ASKING ME REALLY TO BE A SPECIAL MASTER - IS THIS JUDGE LEW - IN AID OF SOME DETERMINATION HE MADE NEEDS TO MAKE. I CERTAINLY HAVE NO AUTHORITY TO DO THAT. AND MY INTEREST HERE IS MAKING SURE THAT THE RULES OF SECRECY CONCERNING THE GRAND JURY ARE PROPERLY FOLLOWED. I WOULD SUGGEST THAT MY REVIEW INDICATE THAT THERE IS A BIT OF SANDBAGGING HERE, A BIT OF GAME PLAYING. MY ONLY INTEREST - I COULD CARE LESS WHAT HAPPENED WITH JUDGE LEWIS CASE ACROSS THE STREET, BUT IF THE GRAND JURY IS MADE A PART OF THAT GAME PLAYING I HAVE A PROBLEM WITH THAT AND THIS COURT HAS A PROBLEM WITH THAT. AND SO WHEN ONE SIDE RAISES SECRECY AND REFUSES TO TURN SOMETHING OVER AND THEN WHEN THE MOTION IS FILED THEN SAYS, "WELL, WE NO HAVE LONGER OPPOSITION." I HAVE A QUESTION ABOUT THAT.

I WILL DENY YOUR REQUEST TO HAVE ANY FURTHER HEARING. I AM GOING TO SIGN AN ORDER -

MS. WIDDIFIELD: I AM SORRY, YOUR HONOR. IF YOU WANT TO FINISH. I WAS GOING TO ADDRESS THE MATTER OF THE ORDER THAT I RAISED WITH A CLERK EARLIER. THERE IS AN INTERLINEATION IN THE ORDER THAT WAS PRESENT THIS MORNING.

THE COURT: I HAVE A COUPLE OF PROBLEMS WITH THE ORDER. ONE, THIS PROBABLY SHOULD HAVE BEEN TAKEN DOWN BY THE GRAND JURY COURT REPORTER, WHO IS DICK COLBY, WHO CAN BE FOUND IN THE GRAND JURY ROOM AS A GENERAL RULE. IN ALL PROCEEDINGS THAT I HAVE BEEN INVOLVED IN IF ITS A GRAND [p. 22] JURY MATTER HE WILL BE THE REPORTER THAT TAKES IT DOWN. SO THE ORDER I AM GOING TO ISSUE WILL BE THAT YOU GET COPIES OF ALL TRANSCRIPTS FROM HIM PAYING YOUR OWN COSTS. I AM NOT GOING TO PAY FOR CIVIL LITIGATION. AS TO THE MINUTES THAT MAY OR MAY NOT EXIST DO YOU KNOW IF THEY EXIST?

MR. BENNETT: MY UNDERSTANDING OF THE ORDER THAT WAS BROUGHT TO MY ATTENTION DEALT ONLY WITH A TRANSCRIPT OF THE TESTIMONY OF MS. BAKER.

THE COURT: THE MOTION ACTUALLY REQUESTS ALL THE MINUTES AS WELL. WELL, THE GRAND JURY MINUTES REQUESTING ALL APPEARANCES OF MS. TRACY BAKER - THEY ALL RELATE TO MS. BAKER, DO THEY NOT?

THE COURT: YES.

MR. BENNETT: NOT TO ANYBODY ELSE.

THE COURT: AND THE GRAND JURY LOGS REFLECTING ALL APPEARANCES BY MS. BAKER. THIS IS WHAT I WILL DO. I DIDN'T DRAFT ANYTHING OUT BECAUSE I DIDN'T KNOW.

THE COURT WILL FIND THAT THERE HAS BEEN A PARTICULARIZED NEED SHOWN BY THE PETITIONER FOR THE GRAND JURY MATERIAL THAT OUTWEIGHS ANY SECRECY ISSUES. THAT THE SECRECY ISSUES ARE OUTWEIGHED BY THE FACT THAT THERE IS A CIVIL LITIGATION ONGOING TO

WHICH ONE SIDE HAS SOMETHING THAT IS MATERIAL THAT THE OTHER SIDE DOES NOT HAVE, AND THE COURT BELIEVES IT WILL BE UNFAIRNESS COMBINED WITH THE FACT THAT THIS CASE EVIDENTLY DID NOT END IN PROSECUTION, AND IN THAT CASE THAT - THEREFORE, THE PARTICULARIZED NEED CERTAINLY OUTWEIGHS THE NEED FOR CONTINUED SECRECY.

[p. 23] THE COURT WILL ORDER THAT COUNSEL UPON PAYMENT TO THE COURT CLERK - THE COURT REPORTER TO THE GRAND JURY SHALL RECEIVE A COPY OF THE TRANSCRIPT OF THE TESTIMONY OF TRACY BAKER BEFORE THE LOS ANGELES COUNTY GRAND JURY ON MARCH 21 1994;

THAT COUNSEL CAN CONTACT, I GUESS COUNTY COUNSEL WOULD BE THE PERSON TO CONTACT TO GET COPIES OF THE GRAND JURY LOGS.

MR. BENNETT: I DON'T BELIEVE WE HAVE POSSESSION OF THAT.

MR. LIGHTFOOT: LET ME SPEAK.

THE COURT: BUT YOU ARE COUNSEL FOR THE GRAND JURY.

MR. BENNETT: I AM NOT APPEARING AS COUNSEL FOR THE GRAND JURY. WE DO HAVE A STATUTORY HOUSE COUNSEL RELATIONSHIP. THE GRAND JURY CAN ASK ME FOR LEGAL ADVICE, IF A CONFLICT DOES NOT OTHERWISE INTERFERE WITH MY DUTY I CAN PROVIDE IT TO THEM, BUT IN THIS CASE OUR OFFICE REPRESENTS PARTIES IN LITIGATION AND I AM NOT THE PROPER ONE TO ADVISE THE GRAND JURY ON THIS MATTER. ONCE THAT BECOMES CLEAR TO ME IN THIS CASE I HAVE CEASED PROVIDING THAT ADVICE.

THE COURT: WELL, EITHER YOUR OFFICE OR THE DISTRICT ATTORNEY'S OFFICE HAS THE NOTES; RIGHT?

MR. BENNETT: MR. WHITE WOULD BE THE ONE TO WHOM THIS SHOULD BE PROPERLY DIRECTED, HE IS THE ONE WHO IS PRESENTLY THE CUSTODIAN OF THE RECORD, I GUESS, AT THE MOMENT SINCE THERE IS NO SECRETARY ANYMORE.

MR. LIGHTFOOT: WE HAD SERVED THE CUSTODIAN A [p. 24] SUBPOENA FOR THESE RECORDS AND WE UNDERSTOOD THAT THE COUNTY COUNSEL -

THE COURT: THAT'S RIGHT. COUNTY COUNSEL RESPONDED AS CUSTODIAN. YOU ALREADY INDICATED ON THE RECORD THAT YOU REPRESENTED THE GRAND JURY

MR. BENNETT: IN THE FEDERAL COURT AND I SHOULDN'T HAVE.

THE COURT: WELL, YOU HAVE.

MR. BENNETT: I HAVE APPEARED HERE.

THE COURT: COUNTY COUNSEL IS ORDERED TO PROVIDE THE GRAND JURY LOG REFLECTING -

MR. BENNETT: I DO NOT HAVE THE LOG.

THE COURT: - REFLECTING ALL APPEARANCES FOR TRACY BAKER BEFORE THE GRAND JURY ON MARCH 21, 1994;

COUNTY COUNSEL IS ORDERED TO PROVIDE THE GRAND JURY MINUTES REFLECTING ALL APPEARANCES BY TRACY BAKER BEFORE THE GRAND JURY ON MARCH 21, 1994;



I BELIEVE IT WILL BE DICK COLBY WHO SHOULD ALSO HAVE THE TRANSCRIPT OF THE CONTEMPT PROCEEDINGS RELATING TO TRACY BAKER CONDUCTED ON MARCH 21, 1994, BEFORE JUDGE COOPER.

I FURTHER ORDER THAT PAUL GABBERT MAY DISCUSS ANY AND ALL PROCEEDINGS WITH HIS COUNSEL AT ANY TIME.

I WILL NOT SET THE MATTER DOWN FOR A RETURN. I DON'T THINK THERE IS ANY NEED FOR IT, YOU SHOULD BE ABLE TO GET THIS STUFF AND WORK IT OUT.

MR. BENNETT: COST OF TRANSCRIPTS?

THE COURT: I DID SAY THAT ALREADY.

[p. 25] MR. LIGHTFOOT: CAN I JUST SPEAK TO ONE PORTION OF YOUR ORDER?

THE COURT: YES.

MR. LIGHTFOOT: DURING THE DEPOSITION OF MR. GABBERT MR. BRAZILE PUT CERTAIN QUESTIONS TO MR. GABBERT AND INDICATED THAT HE WAS PURSUING THE QUESTION BASED ON INFORMATION THAT HE GOT FROM A LOG OR I DON'T KNOW WHAT THE PARTICULAR PHRASE SHOULD BE, BUT IT APPEARED TO BE SOMETHING THAT INDICATED WHO WENT INTO THE GRAND JURY AND WHEN THOSE PEOPLE WENT INTO THE GRAND JURY. AND HE INDICATED ON THE RECORD AND IN THE RECORD OF THE GRAND JURY

THE COURT: LET ME JUST STATE IT AGAIN -

MR. LIGHTFOOT: LET ME JUST TELL THE COURT THAT ONE OF THE ISSUES HERE, ONE OF THE CLAIMS THAT WE ARE MAKING IS THAT MR. GABBERT'S CONSTITUTIONAL RIGHT TO REPRESENT

HIS CLIENT IN THESE GRAND JURY PROCEEDINGS WAS INTERFERED WITH BECAUSE HE WAS TAKEN INTO A ROOM AND SEARCHED FOR A PERIOD OF TIME WHILE MS. BAKER WAS TAKEN INTO THE GRAND JURY AND ASKED QUESTIONS. AND NOW AN ISSUE HAS ARISEN AS TO WHAT WAS HAPPENING INSIDE THE GRAND JURY WHEN MR. GABBERT HAD BEEN TAKEN OFF TO THE SIDE ROOM AND SEARCHED BY THIS SPECIAL MASTER. SO, I NOW COME BACK TO WHAT WAS INDICATED BY MR. BRAZILE DURING THE DEPOSITION OF MR. GABBERT, HE INDICATED -

MR. BENNETT: COULD I OBJECT? THIS IS NOT IN THE RECORD. I DON'T BELIEVE THAT THE COURT CAN. -

THE COURT: MR. BENNETT, LET HIM FINISH.

[p. 26] MR. LIGHTFOOT: MR. BRAZILE INDICATED THAT HE HAD THE GRAND JURY LOG OR SOME SORT OF DOCUMENT WHICH INDICATED THE PRECISE TIMES WHEN MS. BAKER WENT INTO THE GRAND JURY ROOM AND THE PRECISE TIMES WHEN MR. ZOELLER, THE BEVERLY HILLS POLICE OFFICER WHO WAS ALSO PRESENT DURING THE MORNING'S PROCEEDINGS, WENT INTO THE GRAND JURY ROOM. SO WE WOULD ASK THE COURT TO ENLARGE THE ORDER WITH RESPECT TO THIS LOG AT LEAST TO THE EXTENT THAT IT INDICATES WHAT HAPPENED IN THE TOTALITY OF CIRCUMSTANCES THAT MORNING, INCLUDING WHEN OTHER PEOPLE WENT INTO THE GRAND JURY IN ADDITION TO MS. BAKER BECAUSE IT WOULD HAVE RELEVANCE TO THE ISSUE BEFORE -

MR. BENNETT: I DON'T THINK THERE IS EVIDENCE OF THAT BEFORE THE COURT. I UNDERSTAND WHAT'S BEING REPRESENTED, I CANNOT

REFUTE IT, BUT I MEAN IT IS NOT IN THE RECORD, IN EVIDENCE BEFORE THE COURT. YOU HAVE A SIMPLE MOTION FOR RELEASE THAT WAS UNOPPOSED, AND I WOULD SUBMIT THAT THAT'S BEYOND THE SCOPE OF THIS HEARING. THEY HAVE A LOT OF CIVIL DISCOVERY MATTERS TO BE BROUGHT OUT IN FRONT OF JUDGE LEW BUT SHOULD NOT BE LITIGATED HERE.

MR. LIGHTFOOT: I THINK HE JUST SAID THEY BRING THAT HERE.

MR. BENNETT: IF HE BRINGS A MOTION FOR IT IT CAN COME HERE, BUT THAT MOTION IS NOT HERE.

MR. LIGHTFOOT: YOUR HONOR, AS AN OFFICER OF THE COURT I CAN TELL YOUR HONOR THAT I WAS A PERCIPIENT WITNESS TO THE COMMENTS MADE BY MR. BRAZILE AND I AM NOW, IF THE COURT FEELS IT IS APPROPRIATE TO PUT ME UNDER OATH [p. 27] I WILL TELL THE COURT THAT'S WHAT I HEARD MR. BRAZILE SAY.

THE COURT: ALL RIGHT.

I BELIEVE IT IS WITHIN THE CONFINES OF THE MOTION.

THE GRAND JURY LOG REFLECTING ALL APPEARANCES BY ALL WITNESSES CONCERNING THIS INVESTIGATION BEFORE THE GRAND JURY ON MARCH 21, 1994, SHALL ALSO BE ORDERED.

MR. BENNETT: COULD I ALERT THE COURT, ALTHOUGH MS. BAKER IS BEING REPRESENTED BY COUNSEL SHE IS AWARE OF THE RELEASE OF THAT TESTIMONY. OTHER WITNESSES NOT HAVING ANY REPRESENTATION HERE ARE NOT NOW IN TERMS OF OUR NON OPPOSITION, I THINK THAT WAS A

SIGNIFICANT FACTOR IN MY ADVICE TO MR. BRAZILE ABOUT NOT OPPOSING THIS. AGAIN, I SAY WE ARE NOT TAKING A POSITION ON THE COURT'S AUTHORITY HERE IT IS SOLELY A QUESTION OF NO OPPOSITION ON THIS MOTION THAT WAS FILED.

THE COURT: I DON'T THINK THERE IS ANY QUESTION OF THE COURT'S AUTHORITY.

MR. BENNETT: I CAN ONLY SAY THIS THAT THE SUPREME COURT HAS MADE IT RATHER CLEAR THERE IS STATUTORY BASIS FOR ANYTHING WITH REGARDS TO THE GRAND JURY DOCUMENTS. THERE IS ARGUABLY ONE WITH REGARDS TO MS. BAKER.

THE COURT: ACTUALLY THE SUPREME COURT, CALIFORNIA SUPREME COURT HAS CITED ALL THE FEDERAL CASES WHICH TALK ABOUT A PARTICULARIZED NEED TO BE SHOWN, WHICH OVERCOMES THE POLICY OF SECRECY. THAT IS WHY I MADE THE FINDING WHICH I JUST MADE A FEW MOMENTS AGO.

MR. BENNETT: I WOULD AGREE THAT'S IN DIRECT [p. 28] CONFLICT TO MC CLATCHY.

THE COURT: I READ MC CLATCHY AGAIN LAST NIGHT AND YOU ARE WRONG.

THE ORDER WILL STAND. THAT WILL BE IT.

MR. BENNETT: NOTICE IS NOT WAIVED ON THE COURT.

THE COURT: I AM SORRY?

MR. BENNETT: I WOULD LIKE A COPY OF THE ORDER. WHAT I AM INDICATING IS THAT NOTICE IS NOT WAIVED.



THE COURT: IF YOU WANT YOU CAN SPEAK TO THE COURT CLERK. YOU CAN GET A COPY OF IT.

MS. LIGHTFOOT: THANK YOU, YOUR HONOR.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 101

HON. J. STEPHEN  
CZULEGER, JUDGE

IN RE THE MATTER OF ) CASE NO.  
GRAND JURY SUBPOENA FOR ) BH000656  
TRACY L. BAKER, ) REPORTER'S  
 ) CERTIFICATE

STATE OF CALIFORNIA )  
 ) SS  
COUNTY OF LOS ANGELES )

I, M. HELEN THEISS, CSR, #2264, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1 THROUGH 28, COMPRISE A FULL, TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HELD AND TESTIMONY TAKEN IN DEPARTMENT

NO. 101 IN THE MATTER OF THE ABOVE-ENTITLED CAUSE ON MAY 19, 1995.

DATED THIS 24TH DAY OF MAY, 1995.

/s/ M. Helen Theiss CSR #2264  
M. HELEN THEISS,  
OFFICIAL REPORTER

---

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California, at Talcott, Lightfoot, Vandeveld, Woehrle & Sadowsky, 655 South Hope Street, 13th Floor, Los Angeles, CA 90017. I am over the age of 18 and not a party to the within action.

On September 18, 1995, I served the foregoing document described as EXHIBITS IN SUPPORT OF PLAINTIFF GABBERT'S CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT on the plaintiff in this action by placing the true copies thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am readily familiar with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service and the fact that the correspondence would be deposited with the

United States Postal Service that same day in the ordinary course of business.

Executed on September 18, 1995, at Los Angeles, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ Irene Duarte  
By: IRENE DUARTE

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UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NO. CV 94-4227
	)	RSWL (Ex)
Plaintiff,	)	
	)	DEFENDANTS CONN
vs.	)	AND NAJERA'S REPLY
	)	MEMORANDUM OF
DAVID CONN, CAROL	)	POINTS AND
NAJERA, ELLIOTT	)	AUTHORITIES; AND
OPPENHEIM, LESLIE	)	DECLARATION OF
ZOELLER and DOES 1	)	DAVID CONN
through X.	)	
	)	(Filed Sept. 22, 1995)
Defendants.	)	
	)	DATE: OCTOBER 2, 1995
	)	TIME: 9:00 A.M.
	)	COURTROOM: "21"

TO PLAINTIFF, PAUL GABBERT AND YOUR ATTORNEYS OF RECORD:

Defendants David Conn and Carol Najera hereby submit the attached Reply Memorandum of Points and



Authorities and Declaration of David Conn Support of their Motion for Summary Judgment.

Dated: September 22, 1995

DE WITT W. CLINTON  
County Counsel

By /s/ Kevin C. Brazile  
KEVIN C. BRAZILE  
Principal Deputy County  
Counsel

Attorneys for Defendants  
CONN and NAJERA

#### MEMORANDUM OF POINTS AND AUTHORITIES

#### I. DEFENDANTS CONN AND NAJERA ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE PLAINTIFF HAS FAILED TO ESTABLISH A VIOLATION OF CLEARLY ESTABLISHED LAW.

When a defendant raises the defense of qualified immunity the plaintiff bears the initial burden of proving that the defendants violated a clearly established constitutional right. *See Romero v. Kitsap County* 931 F.2d 624, 627 (9th Cir. 1991); *Neely v. Feinstein* 50 F.3d 1502, 1509 (9th Cir. 1995). A clearly established right is one which is sufficiently clear that a reasonable official would understand that what he is doing violates the right. *See Anderson v. Creighton* 483 U.S. 635, 640, 107 S.Ct. 3034, 3939, 97 L.Ed.2d [sic] 523 (1987); *Mendenhall v. Goldsmith* 59 F.3d 685, 692 (7th Cir. 1995). The particular facts of the case determine whether clearly established law was violated by the defendants. *See Backlund v. Barnhart* 778 F.2d 1386,

1389 (9th Cir. 1985); *Newell v. Sauser* \_\_\_ F.3d \_\_\_ (9th Cir. 1995), 95 Daily Journal D.A.R. 12365.

A review of the undisputed facts shows that neither Conn nor Najera violated a clearly established right or law. Plaintiff concedes that he was not allowed to be present with his client when she went before the grand jury to testify. *See Uncontroverted Material Fact No. 3.* Therefore, the mere fact that plaintiff was to be searched while Tracy Baker was to testify before the grand jury was not a violation of his fourteenth amendment right to practice his profession. Since plaintiff has failed to cite any analogous cases to the instant action, it was not possible for either Conn or Najera to know that they were somehow violating plaintiff's right to practice his profession when he was searched, pursuant to a valid warrant, while his client testified before the grand jury. Thus, the absence of either binding or analogous case precedent shows that Conn and Najera did not violate clearly established law. *See e.g. Richardson v. Oldham* 12 F.3d 1373, 1381 (5th Cir. 1994); *Horta v. Sullivan* 4 F.3d 2, 13 (1st Cir. 1993).

To prove that defendants Conn and Najera violated clearly established law plaintiff must show that the right or law violated was clearly established in a particularized and relevant sense, because government officials are only liable for transgressing bright lines. *See e.g. Maciariello v. Summer* 973 F.2d 295, 298 (4th Cir. 1992). The reason for this rule is that qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. *See e.g. Schroeder v. McDonald* 55 F.3d 454, 461 (9th Cir. 1995).

Hence, in order for the law to be clearly established for purposes of qualified immunity the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendants' place, that what he is doing violates federal law. *See Pickens v. Hollowell* 59 F.3d 1203, 1206 (11th Cir. 1995). Furthermore, when considering whether the law applicable to certain facts is clearly established, the facts need not be the same as the facts of the immediate case, but they do need to be materially similar. *See Pickens v. Hollowell* id. For example, mere recitations of general rules or abstract rights do not demonstrate the law was clearly established at the time of the relevant conduct. *See Lassiter v. Alabama A & M Univ. Bd. of Trustees* 28 F.3d 1146, 1150 (11th Cir. 1994) and *Post v. City of Fort, Lauderdale* 7 F.3d 1552, 1557 (11th Cir. 1993) (If case law, in factual terms, has not staked out a bright line, qualified immunity protects the defendant).

Plaintiff alleges that the only occasion in which he was denied access to his client was during the first search. *See Uncontroverted Material Facts* Nos. 19 and 21. Defendants Conn and Najera did not participate in the first search because they were examining Tracy Baker before the grand jury. *See Uncontroverted Material Fact* Nos. 7-8, and 10. It is also undisputed that plaintiff requested that the first search take place in a private room. *See Uncontroverted Material Fact* Nos. 8-9. Furthermore, it is undisputed that each time Tracy Baker made a request to speak with plaintiff her requests were granted. *See Uncontroverted Material Facts* Nos. 42-48.

There is no binding case law, analogous, or similar case precedent which could have alerted Conn and

Najera that they somehow interfered with plaintiff's right to practice his profession when they honored Tracy Baker's requests to confer with her attorney. Since Conn and Najera did not accompany Tracy Baker out of the grand jury room when she left and because Tracy Baker never advised or informed them that she did not or could not speak with her attorney when she was allowed to leave, it was not possible for either Conn and Najera to knowingly violate plaintiff's constitutional rights. Moreover, it is undisputed that Conn and Najera did not personally do anything to prevent plaintiff from speaking with his client when Baker was given permission to leave the grand jury hearing room. *See Uncontroverted Material Facts* 52-57.

Due to plaintiff's failure to present any facts which show that either Conn or Najera actively or personally prevented him from speaking to his client, he has failed to prove that Conn and Najera violated clearly established law. Furthermore, since Tracy Baker gave every indication that she had in fact spoken with plaintiff based upon how she asserted her fifth amendment privilege, neither Conn nor Najera knowingly violated the law.

## II. THE CONDUCT OF CONN AND NAJERA WAS OBJECTIVELY REASONABLE EVEN IF THEY VIOLATED CLEARLY ESTABLISHED LAW.

A defendant is entitled to qualified immunity even where he violates the law if the person's conduct was objectively reasonable in light of pre-existing law. *See e.g. Romero v. Kitsap County* 931 F.2d 624, 627 (9th Cir. 1991); *Neely v. Feinstein* 50 F.3d 1502, 1509 (9th Cir. 1995). Thus,



if any reasonable prosecutor could have believed that the conduct of Conn and Najera was lawful then the defendants are entitled to qualified immunity. See *e.g. Post v. City of Fort Lauderdale* 7 F.3d 1552, 1557 (11th Cir. 1993); *Eversole v. Steele* 59 F.3d 710, 717 (7th Cir. 1995).

The conduct of Conn and Najera was objectively reasonable for three (3) distinct reasons. First, each time Tracy Baker made a request to consult with plaintiff she was allowed to leave the Grand Jury hearing room without any interference from Conn or Najera. Second, Tracy Baker gave every indication that she had in fact consulted with plaintiff, because after she left and returned to the grand jury room, she never advised anyone that she had not spoken with her attorney. See Declarations of Conn and Najera. Finally, once Tracy Baker left the grand jury room to consult with plaintiff, Conn and Najera did not do or say anything to prevent, delay or interfere with plaintiff's efforts to speak to his client. Furthermore, it should be noted that Tracy Baker always asserted her fifth amendment right on the advice of counsel, which would lead a reasonable person to conclude that she had in fact consulted with her attorney.

Since plaintiff has failed to present evidence that Conn and Najera engaged in conduct which prevented or interfered with him speaking to Baker after she had gone before the grand jury, the conduct of Conn and Najera was objectively reasonable. In addition, when one considers the Grand Jury transcript (See Exhibit "2") along with plaintiff's concession that he was only denied access to his client during the first search, which Conn and Najera had no personal participation in, it is obvious that Conn and Najera acted reasonably. Moreover, in the

absence of a binding, analogous or similar factual case precedent to the instant action, the conduct of Conn and Najera was undoubtedly objectively reasonable, because no reasonable prosecutor would have believed Conn or Najera's conduct was unlawful. This is especially true when one also considers that plaintiff was searched pursuant to a valid warrant and in a private room that plaintiff himself requested. See Uncontroverted Material Facts Nos. 8-10.

### III. PLAINTIFF HAS FAILED TO PRESENT SUFFICIENT EVIDENCE OF ANY REAL OR IMMEDIATE THREAT OF FUTURE INJURY.

Under Federal Rule of Civil Procedure 56(c), a party is entitled to summary judgment when the pleadings, depositions . . . together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See *Musick v. Burke* 913 F.d. [sic] 1390, 1393 (9th Cir. 1990). The standard for summary judgment is the same standard used to judge a Motion for Directed Verdict, which is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. See *Musick v. Burke* id. At page 1394; *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 251-252, 106 S.C. 2505, 2512, 91 L.Ed.2d 202 (1986).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment because the requirement is that there be no genuine issue of *material*

fact. See *Hanon v. Data products Corp.* 976 F.d. [sic] 497, 500 (9th Cir. 1992); *Anderson v. Liberty Lobby, Inc.* *supra* 477 U.S. at 247-248. A material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. See *Hanon v. Data products Corp.*, *id.* At page 500. Conversely, where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U.S. 574, 587, 106 S.C. 1348, 1356, 89 L.Ed.2d. 538 (1986); *Hanon v. Data products Corp.* *id.* at page 500; *Nishimoto v. Federman-Bachrach & Associates* 903 F.d. [sic] 709, 716 (9th Cir. 1990).

The non-moving party cannot to successfully oppose a motion for summary judgment by an affidavit containing conclusory allegations. See *Anderson v. Liberty Lobby, Inc.* *supra* 477 U.S. at 249; *Lujan v. National Wildlife Federation* 497 U.S. 871, 110 S.C. 3177, 3188, 111 L.Ed.2d 695 (1990). Moreover, the mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient to defeat a properly supported motion for summary judgment. See *Anderson v. Liberty Lobby Inc.*, *id.* 106 S.C. At 2512.

In the case of *Celotex Corp. V. Catrett* 477 U.S. 317, 106 S.C. 2548, 2552-2553, 91 L.Ed.2d. 265 (1986), the Supreme Court held that summary judgment shall be entered against a party who fails to establish an essential element of that party's case, by stating as follows:

"In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on the essential element of her case with respect to which she has the burden of proof."

In *Anderson v. Liberty Lobby, Inc.* *supra*, 106 S.C. 2505, the court articulated the standard of proof the non-moving party must meet to defeat a motion for summary judgment, by stating:

"Instead, the plaintiff must present *affirmative evidence* in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant as long as the plaintiff has had a full opportunity to conduct discovery." (Emphasis added)

The only evidence offered by plaintiff for declaratory relief is the declaration he has submitted. The declaration submitted by plaintiff is inadequate because it is based upon speculation and conjecture, as well as hearsay. Thus, defendants hereby object on the grounds of: 1) hearsay, 2) speculation and conjecture 3) lack of foundation and 4) lack of personal knowledge, to paragraph 2, lines 16-18 of the declaration. Defendants also object to paragraph 3, lines 20-21 of the declaration on the grounds



of: 1) hearsay 2) lack of personal knowledge 3) lack of foundation and 4) speculation.

Plaintiff's declaration alleges at paragraph 4, lines 24-28, "on information and belief," that the prosecutors did not obtain a letter purportedly written from Lyle Menendez to Tracy Baker, and he further alleges in paragraph 4 that he "believes" the District Attorneys Office will again attempt to obtain this purported letter. Defendants hereby object to paragraph 4 in its entirety on the grounds of: 1) hearsay 2) lack of foundation 3) lack of qualification 4) speculation and 5) lack of personal knowledge.

Plaintiff also alleges that if Tracy Baker is subpoenaed to testify in the future he will represent her. However, plaintiff does not even know if and when Tracy Baker will be subpoenaed in the future, and his belief that she may is based on mere hunches and paranoia.

According to the attached declaration of David Conn there is no immediate or threatened likelihood that Tracy Baker will be called back before the grand jury, because she is not on the witness list of either the prosecution or defense in the second Menendez brothers trial, which has already commenced. The only reason Ms. Baker was called before the grand jury in March, 1994, was due to the testimony she gave at the first Menendez trial which formed the sole basis for the perjury investigation by the grand jury. (See Exhibit "2", at pages 37-46). However, since neither the prosecution nor defense intends to call her as a witness in the second trial, there would be no basis for subpoenaing her once again before the grand jury. Moreover, since Ms. Baker repeatedly asserted her

fifth amendment privilege during the grand jury proceeding on March 21, 1994, it would be futile to subject her to another grand jury proceeding, where all she would do is assert her fifth amendment privilege again.

To obtain injunctive relief plaintiff must show that the threat of injury is real and immediate, instead of only conjectural or hypothetical. *See e.g. Orantes-Hernandez v. Thornburgh* 919 F.d. [sic] 549, 557 (9th cir. 1990). Moreover, a showing of only one alleged incident of unconstitutional conduct is insufficient to obtain injunctive relief. *See e.g. Orantes-Hernandez v. Thornburgh* id. At page 558. The declaration of plaintiff only articulates a conjectural or hypothetical injury, that is extremely remote and unlikely to occur because Tracy Baker is not expected to be called as a witness in the second trial. Furthermore, since March, 1994, plaintiff cannot point to any other occasion where the District Attorneys office has allegedly interfered with his constitutional rights or the rights of his clients.

To conclude, in light of the evidentiary deficiencies of plaintiff's declaration, and the hypothetical nature of the alleged threat of future harm, and the lack of a series of unconstitutional incidents, plaintiff has failed to offer sufficient evidence to support his claim for declaratory or injunctive relief. Dated: September 22, 1995

DE WITT W. CLINTON

County Counsel

By /s/ Kevin C. Brazile

KEVIN C. BRAZILE

Principal Deputy County Counsel  
Attorneys for Defendant  
CONN and NAJERA

### DECLARATION OF DAVID CONN

If called as a witness I could and would competently testify to all of the facts and information contained herein based upon my own, first-hand, personal knowledge.

1. I am an attorney at law duly licensed and practicing before all of the Courts of the State of California, and I am a Deputy District Attorney with the Los Angeles County District Attorneys Office. I have been employed with the District Attorneys Office since 1978, and on March 21, 1994, I was one (1) of two (2) deputy district attorneys assigned as the prosecutors on the case entitled *People v. Eric and Lyle Menendez*.

2. I am the lead prosecutor in the second trial of Eric and Lyle Menendez, in which jury selection commenced this month. The reason Tracy Baker was subpoenaed before the grand jury on March 21, 1994, was for an inquiry into possible perjury she committed during the first Menendez trial when she testified as a witness. During her grand jury testimony Tracy Baker asserted her fifth amendment privilege to all questions pertaining to the Menendez brothers.

3. Tracy Baker will not be called as a witness in the second Menendez trial because she is not on my witness list and she is not on the witness lists submitted by Eric and Lyle Menendez. Since Ms. Baker is not expected to testify at the second trial there is no likelihood that she would be called before the grand jury regarding a possible perjury investigation. Furthermore, it would be useless to call her before the grand jury again about her testimony in the first trial, because she would only assert her fifth amendment privilege once again.

4. The only criminal case that I am handling at the present time is the Menendez case and plaintiff, Paul Gabbert, is not the attorney of record for either of the defendants in that case. I know of no reasons why plaintiff would be subjected to any further searches, pursuant to a warrant, and I am not aware of any clients of his who are likely to testify before the grand jury in the future.

5. Tracy Baker will not be called as a witness by the prosecution in the second Menendez trial, and I do not know of any value she could serve the defense by testifying. Thus, any contention by plaintiff that Tracy Baker is a potential prosecution witness is false and plain wrong, because I do not intend to call her as a witness and she is not on any witness lists.

I declare all the foregoing to be true and correct under penalty of perjury.

Executed this 21st Day of September, at Los Angeles, California.

/s/ David Conn  
DAVID CONN

### PROOF OF SERVICE

STATE OF CALIFORNIA       )  
  ) s.s.  
COUNTY OF LOS ANGELES   )

I am employed in the County aforesaid; I am over the age of eighteen and not a party to the within action; my



business address is 500 West Temple Street, Los Angeles, California 90012.

On September 22, 1995, I served the within DEFENDANTS CONN AND NAJERA'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES; AND DECLARATION OF DAVID CONN in the case of *Paul L. Gabbert v. David Conn, et al. Case No. CV 94-4227 RSWL (Ex)* by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in a United States mail box in Los Angeles, California, addressed as follows:

Scott D. MacLatchie  
FRANSCCELL, STRICKLAND, ROBERTS  
225 S. Lake Avenue Penthouse  
Pasadena, Ca. 91101-3005

Michael J. Lightfoot  
TALCOTT, LIGHTFOOT, VANDDEVELDE,  
655 S. Hope Street, 13th Fl.  
Los Angeles, Ca. 90017

and that the person on whom said service was made has his office at a place where there is a delivery service by United States mail, and that there is a regular communication by mail between the place so addressed.

service was made has his a delivery service by United regular communication by mail

I declare under penalty of perjury that the foregoing true and correct.

Executed on this 22th day of September, 1995 at Los Angeles, California.

/s/ Barbara J. Holmes  
BARBARA J. HOLMES

United States District Court for the  
Central District of California

[Caption Omitted In Printing]

October 3, 1995 Judgment and Order Granting Defendants Conn & Najera's Motion to Dismiss

\* \* \*

10/3/95 61 JUDGMENT AND ORDER: by Judge Ronald S. Lew against plaintiff Paul L. Gabbert granting dft conn & Najera motion for Summary judgment [38-1] (ENT 10/5/95) (lk) [Entry date 10/05/95]

\* \* \*

Docket as of March 12, 1996 3:15 pm

No. 97-1802

David Conn and Carol Najera,

Petitioners

v.

Paul L. Gabbert

**ORDER ALLOWING CERTIORARI. Filed October 5, 1998.**

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted limited to the following questions:

1. Does a prosecutor violate an attorney's rights under the Fourteenth Amendment by causing the attorney to be searched at the time his client is testifying before a grand jury?
2. If the answer to the first question is "yes," was such a right on the part of the attorney clearly established in March, 1994?

October 5, 1998

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